IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2010-409-002466

UNDER	the Resource Management Act 1991
IN THE MATTER OF	an appeal under s 299 of the Resource Management Act 1991
BETWEEN	WEST COAST REGIONAL COUNCIL Appellant
AND	FRIENDS OF SHEARER SWAMP INCORPORATED First Respondent
AND	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Second Respondent
AND	DIRECTOR GENERAL OF CONSERVATION Third Respondent

Hearing: 19 April 2011
(Heard at Gloaming Room, Riccarton Raceway)

Appearances: J M van der Wal for Appellant
P D Anderson for First Respondent
EHF Toleman for Second Respondent
D van Mierlo and K Muller for Third Respondent

Judgment: 30 June 2011

RESERVED JUDGMENT OF HON JUSTICE FRENCH

Introduction

[1] Section 6(c) of the Resource Management Act 1991 states:

> **6 Matters of national importance**
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> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
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> ...
>
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:

[2] In the interim decision under appeal,[1] the Environment Court was acting in its planning capacity. It issued an appendix to Variation 1 of the Proposed West Coast Land and Riverbed Management Plan, listing the criteria to be used in determining whether a wetland in the region contains areas of significant indigenous vegetation or significant habitats of indigenous fauna.

[3] The key issues raised by the appeal are:

(i) In formulating its significance criteria, did the Environment Court make national issues rather than regional issues its primary or core focus, and if so was that an error of law?

(ii) Did the Environment Court hold that "significant" under s 6(c) is not a relative concept, and if so did it thereby misinterpret s 6(c)?

(iii) In interpreting the meaning of "significant" under s 6(c), was the Court required to have regard to s 5 of the Act?

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[1] *Friends of Shearer Swamp Inc v West Coast Regional Council* [2010] NZEnvC 345.

Factual background

[4] Variation 1 of the Proposed West Coast Land and Riverbed Management Plan provides for the management of wetlands in the West Coast.

[5] The management of wetlands is a crucial biodiversity issue in many parts of New Zealand. Up to 90 per cent of New Zealand's wetlands have been lost since 1840.

[6] Compared with the rest of the country, the West Coast region contains more wetlands than many others.

[7] Under the original version of Variation 1, the West Coast Regional Council proposed to recognise and protect 22 wetlands listed in a schedule. Activities affecting the listed wetlands were to be non-complying activities, while activities affecting all other wetlands were permitted.

[8] Four appeals were filed in relation to Variation 1.

[9] Prior to the hearing, ecologists retained by the various parties had conferred to try to reach agreement about the criteria that should be used to identify significant wetlands on the West Coast. As a result of subsequent "hot tubbing" at the hearing and further caucusing, the seven ecologists issued a final joint statement in March 2010 detailing the areas of agreement.

[10] What the ecologists agreed was that for a wetland to qualify as an area of significant indigenous vegetation or a significant habitat of indigenous fauna, it must satisfy at least one of four criteria, namely:

- ecological context;
- representativeness;
- rarity;

- distinctiveness.

[11] According to the Environment Court judgment, the ecologists were all agreed on the wording of criteria for ecological context and distinctiveness. On the remaining criteria they were also agreed that:

(a) Rare wetlands and representative wetlands are areas that include significant indigenous vegetation and significant habitats of indigenous fauna.

(b) Whether a wetland is a rare or representative wetland is to be determined at the scale of the ecological district and freshwater biogeographic unit.

[12] However, they did not agree on what was meant by "representativeness", or on the wording of the rarity criteria.

[13] In April 2010 the parties filed a joint memorandum and draft consent order. These recorded, amongst other matters, an agreement to amend Variation 1 by creating a second schedule containing wetlands currently not listed in Schedule 1. The regime proposed was that if certain ecological criteria for significance were satisfied, the wetland would be included in Schedule 2, rendering any development activity affecting that wetland a discretionary activity.[2]

[14] The joint memorandum identified the only outstanding matter requiring a hearing as being the issue of whether one of the agreed criteria – the representativeness criterion – should contain a "good quality" threshold, and if so, how that threshold should be formulated.

[15] The memorandum concluded by detailing the parties' proposals as to how the resumed hearing should be conducted. It included an agreement that no other witnesses except for certain listed ecologists would be called.

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[2] Under the Act, a discretionary activity may be granted or declined, and may have conditions imposed.

[16] The hearing accordingly resumed in June 2010 on that basis, without the Court hearing any planning evidence.

[17] At the resumed hearing, ecologists retained by the Department of Conservation and the Friends of Shearer Swamp proposed a representative criterion that had two parts:[3]

> ... Excluding pakihi, to qualify as an area of significant indigenous vegetation or habitats of indigenous fauna the wetland must contain:
>
> Either
>
> (a) **Indigenous wetland vegetation types** that have the following attributes:
>
> (i) The indigenous wetland vegetation types that are typical in plant species composition and structure; and
>
> (ii) The condition of the wetland is what would have existed prior to 1840 in that:
>
> - indigenous species dominate; and
> - most of the expected species and tiers of the wetland vegetation type(s) are present
>
> for the relevant class of wetland.
>
> Or
>
> (b) the wetland contains **indigenous fauna assemblages** that:
>
> (i) are typical of the wetland class; and
>
> (ii) indigenous species are present in most of the guilds expected for the wetland habitat type.

[18] This was opposed by the Regional Council's ecologist, Dr Keesing, and also by another ecologist, Dr Bartlett, who had been called on behalf of Solid Energy. Both wanted to impose an additional threshold on the criterion, but for slightly different reasons.

[19] For his part, Dr Keesing was concerned the criterion advocated by the current respondents was too broad and would result in too large a number of wetlands

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3 *Friends of Shearer Swamp Inc v West Coast Regional Council*, above n1, at [32].

qualifying as significant. He proposed ranking the wetlands and then recognising and providing for 30 per cent of the best representative indigenous vegetation types associated with each of the different classes of wetland.

[20] Dr Bartlett's concern was not so much the number of wetlands that might qualify, but rather quality. She proposed a representative criterion formulated so as to capture a good quality wetland that is now less than 30 per cent of its former extent in the ecological district or freshwater bio-geographic unit.

[21] As regards the rarity criterion, Drs Keesing and Bartlett expressed a preference for rarity to be subsumed by the representativeness criterion, rather than remaining as a separate criterion. They also proposed that rare classes of wetland should be determined inter alia by using the Land Environments of New Zealand classification system.

The decision of the Environment Court

[22] In its decision on the significance criteria, the Court said its starting point was s 6 and that significance imports the notion of informed judgment as to those natural resources in the region that need to be protected.[4]

[23] As regards the specific issue of representativeness, the Court noted that the concept of representativeness first appeared in the Reserves Act 1977, which has as a goal:[5]

> Ensuring, as far as possible, the survival of all indigenous species of flora and fauna, both rare and commonplace, in their natural communities and habitats, and the preservation of representative samples of all classes of natural ecosystems and landscape which in the aggregate originally gave New Zealand its own recognisable character

[24] The Court also referred to evidence that recognising and providing for areas of representative wetlands is essential to maintaining long-term biological diversity.[6]

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4 At [54], following *Minister of Conservation v Western Bay of Plenty District Council* EnvC Auckland A71/2001, 3 August 2001 at [18]-[19].

5 Reserves Act 1977, s 3(1)(b).

6 At [30].

[25] After discussing the competing views that had been expressed at the hearing, the Court concluded that it preferred the representative criterion proposed by the Department of Conservation and the Friends of Shearer Swamp.

[26] In coming to that conclusion, the Court identified the following drawbacks in the alternative approaches advocated by Doctors Keesing and Bartlett:

- The percentage threshold of 30 per cent was an arbitrary figure.
- If measured by area, representative wetlands may comprise few very large wetlands.
- The threshold will not protect the full range of biodiversity in the West Coast region.
- Before the threshold can be applied, all wetland vegetation types within each class of wetland must be assessed under the representative criterion, both at the ecological district and freshwater biogeographic scales.
- The first applicant for resource consent would be required to undertake the entire threshold assessment for the class of wetland in respect of which his/her activity relates.
- The methodology to determine the land area containing the best representative wetlands has not been developed.
- Assuming a methodology could be developed, the determination of significance at the level of vegetation type is impractical because some vegetation types exist along a gradient or continuum and vegetation types evolve over time.
- What is "the best of" is a subjective determination.
- The ranking will likely be a profitable area of debate.
- The implementation of the criterion would be time-consuming and expensive.
- Under Dr Keesing's approach there is a potential for land to be developed down to the threshold.
- Dr Bartlett's threshold will not capture all of the classes of wetland.
- A rare class of wetland is likely to be representative because usually it will be the best of what remains.
- Representativeness as a criterion would be redundant if in order to qualify one of the other criterion also has to be satisfied.
- The criterion considers the wider ecosystem and is too broad to capture different wetland types and fauna assemblages.
- It relies on the accuracy of the LENZ database to determine the former extent of the wetland.

- The threshold is an arbitrary measure and information is not presently available to rank these wetlands.

[27] The Court went on to say:

> [42] *Significance* does not lie in the size of the *class* but concerns the value(s) ascribed to those features or attributes that are shared by the members of a class; where the values may be intrinsic or extrinsic (or both). We understood all of the ecologists to say that wetlands that contain areas of indigenous wetland vegetation types or indigenous fauna assemblages which are typical and in a condition that they would have been prior to 1840 are significant for the purposes of section 6(c)[49]. Representativeness is not a relative concept (at least not in the way suggested by the Regional Council and Solid Energy).
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> [43] The purpose of Dr[s] Keesing and Bartlett's thresholds was *to capture the best examples of*[50] the representative wetlands. Dr Keesing said his proposed threshold is *loosely based* on the species-area curve. (As the amount of habitat reduces, the susceptibility to loss of species increases exponentially, decreasing dramatically below the 20% threshold or 30% if the wetlands are fragmented)[51]. The threshold levels typically relate to terrestrial habitats[52].
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> [44] We did not understand the representativeness criterion to be necessarily concerned with the physical extent of habitat. The purpose of the representative criterion is to provide for the maintenance and persistence of biological diversity in the West Coast. Given Dr Keesing's evidence that whether a wetland was the *best* example was not relevant to the maintenance and persistence of biological diversity, there is no reasoned basis to impose this qualification[53].
>
> [45] The Regional Council's preferred criterion would impose a significant burden on the first applicant for resource consent, its approach would not enable people or communities in relation to their use of natural and physical resources.
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> [46] For these reasons, and given also the drawbacks set out in the preceding section, we do not accept the criteria proffered by the Regional Council and Solid Energy NZ Limited. Their criteria would neither be efficient nor an effective means for achieving the objective and policies of the Variation. Most of these criticisms are not addressed by the Regional Council's proposal that using Dr Keesing's criteria, it will undertake at its own expense the assessment of representative wetlands of wetland held in private ownership, if DoC were to do likewise in relation to land that it administers[54].
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> [47] There was no evidence that the representativeness criterion proposed by DoC and others was impractical or unable to be implemented. We are satisfied that the criterion proposed by DoC and others is an efficient and effective method.

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49 Dr Keesing's evidence was not entirely consistent on this matter as he also said that he does not consider the historical condition of the wetland to be important in supporting

the values derived from biological diversity – and so species composition is not *critical* (transcript p. 694).

50 Dr Keesing, further rebuttal evidence, para 8.

51 Ministry of Environment *Statement of National Priorities for Protecting Rare and Threatened [Indigenous] Biodiversity on Private Land*, April 2007, pp 5-6.

52 Dr Keesing evidence-in-chief para 51.

53 Transcript p. 512.

54 Counsel for Regional Council's closing submissions.

[28] As regards the issue of whether the rarity and representativeness criteria should be distinct requirements, the Court held separation was appropriate given their different objectives. It also held that because of the limitations of the LENZ database, it should not be used as the sole determinant of rarity.

[29] The Court attached its proposed wording for the significance criteria as a schedule to the decision. The Court's formulation is substantially the same as that advocated by the respondents to this appeal. Although the Court ordered that the Plan was to be amended by the inclusion of its attached schedule, Appendix 8, leave was reserved to any party to comment on the wording.

[30] The remainder of the decision deals with the proposed amendments to other Plan provisions which had been agreed by the parties. As the Court noted, in the absence of planning evidence it had in effect been required to conduct a review of the Plan. The Court identified a number of concerns with the draft consent orders and declined to grant them. A further hearing to canvass these other matters (which include the issue of how wetlands not included in either Schedule 1 or 2 are to be managed) is set down for August this year.

[31] This latter part of the decision has not been appealed, the appeal being limited to the Court's resolution of the differences between the ecologists.

Grounds of appeal

[32] The Regional Council contends that in determining the significance criteria, the Court made four errors of law:[7]

(i) Placed insufficient weight on the specific functions and duties of the Regional Council and the purposes of a Regional Plan.

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7 Counsel acknowledge that the first two errors of law are interrelated.

(ii) Placed excessive weight on the national scarcity of wetlands and the national priorities for wetland management as identified in non-statutory policy documents.

(iii) Misinterpreted s 6(c) by finding that the representativeness component of significance under s 6(c) is not a relative concept and that the size or proportion of a class that could be considered significant was irrelevant.

(iv) Failed to have regard or sufficient regard to the overarching purposes of s 5 of the Act when interpreting s 6(c).

[33] These errors are said to have resulted in the Court failing to include in its "significance" criteria the thresholds that were necessary to ensure that only wetlands significant in the region were identified as significant. By misinterpreting s 6(c), it is argued that the Court has elevated the section and the protection it requires to a level that eclipses the overarching purpose of Part 2 and the regional focus of a Regional Plan.

[34] The underlying concern is essentially that the Court's criteria are not sufficiently discriminating, that too many wetlands will qualify as significant, thereby hampering development, and that the West Coast, which has a relative abundance of wetlands, is being made to compensate for the acute shortage of wetlands elsewhere in the country.

Principles to be applied

[35] The principles governing appeals from the Environment Court are well established and may be usefully summarised as follows.

[36] An appeal to this Court under s 299 is an appeal limited to questions of law. Appellate intervention is therefore only justified if the Environment Court can be shown to have:

(i) applied a wrong legal test; or

(ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or

(iii) taken into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

[37] Further, not only must there have been an error of law, the error must have been a "material" error, in the sense that it materially affected the result of the Environment Court's decision.

[38] The Court must be vigilant to resist attempts by disappointed litigants to use appeals to the High Court as an occasion for revisiting resource management merits under the guise of questions of law.

[39] Mindful of these principles, I turn now to consider each of the alleged errors of law.

Did the Court make national issues (in particular the national scarcity of wetlands) its primary focus, thereby wrongly subordinating regional considerations?

[40] Mr van der Wal conceded that the Court was entitled to take national issues into account. He also acknowledged that the Court had not completely disregarded regional considerations. His complaint was that the Court had focused on national issues to the point where it had elevated them above regional considerations. That, in his submission, amounted to an error of law because it was contrary to the statutory purposes of a Regional Plan, the position of a Regional Plan in the hierarchy of statutory planning documents, and contrary to the statutory functions and duties of a Regional Council.

[41] Mr van der Wal contended that a Regional Council is charged with the function of managing its region, not making up for shortages elsewhere in the country, and that as a result of its error the Court ended up considering the ecological evidence it had heard against the wrong legal framework. The upshot, according to Mr van der Wal, is that unless the appeal is allowed, the Regional Plan will contain criteria based on the national scarcity and national management of wetlands rather than their regional abundance and appropriate management at a regional level. Had the Court approached its evaluation on a regional basis, Mr van der Wal says it would have had to place far more weight on the extent to which the West Coast differs from the rest of New Zealand when it comes to the abundance of wetlands and the fact that the vast majority of land is conservation estate already subject to a high degree of existing protection through the Conservation and/or Reserves Acts. As it was, the Court simply failed to give these key regional issues the degree of recognition they required, and instead of reasoning that abundance made the protection of wetlands on the West Coast less critical than elsewhere, it reasoned that because there are so many on the West Coast, their protection becomes all the more important for national management reasons. "Nationally rare" was wrongly translated into "regionally significant".

[42] In support of his arguments about the Court's over-emphasis on national issues, Mr van der Wal drew my attention to the extent to which national issues feature in the decision, through:

(a) the Court's citation of non-statutory national policy documents dealing with the national scarcity of wetlands and the national management of wetlands;[8]

(b) the fact the Court begins its judgment with a discussion of national issues and that this discussion is a reasonably lengthy and detailed one.

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[8] *The New Zealand Biodiversity Strategy* (2000); *Statement of National Priorities for Protecting Rare and Threatened Indigenous Biodiversity on Private Land* (2007). By non-statutory, Mr van der Wal meant not recognised in Part 5 or Schedule 1 of the Act.

[43] Mr van der Wal also referred me to authorities where the Courts have said that a district/region does not have to look beyond its own boundaries in deciding whether an area is significant or a landscape outstanding for the purposes of s 6.[9]

Discussion

[44] Under s 30 of the Resource Management Act, the statutory functions of a Regional Council include the control of the use of land for the purpose of the maintenance and enhancement of ecosystems within water bodies including wetlands. The functions are also expressed to include the establishment, implementation and review of objectives, policies and methods for maintaining indigenous biological diversity.[10]

[45] As for Regional Plans, their purpose is to assist the Regional Council to perform its functions.[11]

[46] Section 66 sets out the matters which must be considered by a Regional Council (or the Environment Court on appeal) when preparing Regional Plans or changes to Regional Plans.

[47] Section 66(1) expressly states that a Regional Council must prepare and change any Regional Plan in accordance with its functions under s 30 and the provisions of Part 2. Section 6 is contained in Part 2, and accordingly the council was required in its plan to recognise and provide for the specified matters of national importance, including the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.

[48] In light of those provisions, Mr van der Wal was clearly right to concede that the national state of wetlands must be a relevant consideration for a Regional

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9 *Minister of Conservation v Western Bay of Plenty District Council; Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC).

10 Resource Management Act 1991, s 30(1)(ga).

11 Resource Management Act 1991, s 63.

Council when preparing its Regional Plan. This is confirmed by *Mighty River Power Ltd v Waikato Regional Council.*[12]

[49] It also follows, in my view, that the Court was entitled to have regard to national policy documents even if those documents did not have any status under the Act. The documents in question were relevant and admissible.[13] The Court did not regard them as binding policy documents. Rather, they were essentially background material.

[50] The thrust of Mr van der Wal's argument is of course that while national issues may be relevant, they should not have been allowed to dominate and take precedence over the regional. National scarcity should not have been the prime or main driver in determining what is significant for the region.

[51] It is unnecessary for me to determine the correctness of that argument as a proposition of law, because having read the Court's decision I am satisfied national issues were not in fact determinative and that the Court did keep a regional focus at all times. National issues were not its core focus.

[52] The extensive evidence which the Court relied upon in fashioning its criteria was very much focused on defining significance for wetlands on the West Coast, taking into account the West Coast's specific factors. The experts all discussed the state of wetlands on the West Coast, the specific ecological values of West Coast wetlands, the implications for the West Coast of the proposed criteria and how the criteria could be applied in a practical way in a West Coast setting. The evidence even included maps of the region's wetlands, identifying which wetlands would meet the proposed criteria and which would not.

[53] Significantly, too, there was also evidence that in other regions the test would be different. In other words, the discussion was predicated on the basis that significance is not an absolute term and that what might qualify as significant in one region would not necessarily qualify as such in another.

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12 *Mighty River Power Ltd v Waikato Regional Council* EnvC Christchurch A146/2001, 14 December 2001.

13 Resource Management Act 1991, s 276(1)(a).

[54] The decision itself is permeated with references to the regional context, and at one point the Court expressly finds that the criteria which it adopted did take the regional context into account when determining significance.[14]

[55] I note too that conversely, the reason the Court rejected the criteria advocated by the Regional Council was not because of the national state of wetlands, but because the Court considered the proposed additional criteria to be impractical and unable to protect the range of West Coast biodiversity.

[56] As regards the decisions relied upon by Mr van der Wal, I do not consider they assist him. Statements made in those cases about regions not being required to look beyond their boundaries were made in situations where the regional standard was lower than the national standard, not the other way around. All the Court was saying in those other cases was that national importance is not a prerequisite. Something can be regionally significant/outstanding without having to be nationally significant/outstanding. The cases did not deal with the converse, which is the issue here.

[57] Even if authority exists which expressly prohibits reasoning that because something is nationally significant it must, of necessity, be regionally significant, I am satisfied the Environment Court in this case did not reason in that way. At no stage in its decision does the Court say that because West Coast wetlands are nationally significant they must, by definition, automatically be regionally significant.

[58] I am satisfied that regional considerations were integral to the decision and not peripheral as is claimed.

[59] In coming to this conclusion, I have not overlooked another argument raised by Mr van der Wal, namely that the Court was wrong to base its interpretation of significance under s 6(c) on the evidence of the ecologists, and wrong to allow the experts to dictate the level of the threshold. It was, Mr van der Wal says, a legal issue for the Court and the Court alone. In Mr van der Wal's submission, what the

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[14] At [57].

Court should have done was to instruct the ecologists about the correct interpretation of s 6(c) for the Regional Plan. The exposition should have included an instruction that there are degrees of significance, specified how high the threshold for significance lay as a matter of law, and the manner in which it should be predicated on the functions of a Regional Council and the purposes of a Regional Plan. Mr van der Wal contended that by not doing this the Court had effectively adapted the law to the evidence rather than test the evidence against the correct interpretation of the law.

[60] An obvious objection to this argument is that the Regional Council agreed to the matter being approached in the way it was.

[61] In any event, I am satisfied it was entirely appropriate for the Court to rely on ecological evidence to determine the most appropriate criteria. That is an approach that has been taken in other cases, and it makes sense given the nature of the issue.[15] The Court did not rubber-stamp the ecologists' evidence. Far from it. The Court subjected the proposed criteria to close analysis, amended criteria where necessary and rejected other proposals. It satisfied itself that the evidence had a regional context and accorded with the statute.

Did the Court err in its interpretation of the word "significant" in s 6(c) by finding that relativity and class size are irrelevant?

[62] At [42] of its decision, the Court stated:

> *Significance* does not lie in the size of the *class* but concerns the value(s) ascribed to those features or attributes that are shared by the members of a *class*; where the values may be intrinsic or extrinsic (or both). We understood all of the ecologists to say that wetlands that contain areas of indigenous wetland vegetation types or indigenous fauna assemblages which are typical and in a condition that they would have been prior to 1840 are significant for the purposes of section 6(c). Representativeness is not a relative concept (at least not in the way suggested by the Regional Council and Solid Energy).

[63] Mr van der Wal submits this amounts to a finding that significance is defined solely by values or attributes and is not essentially relative.

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[15] *Minister of Conservation v Western Bay of Plenty District Council*; *Mighty River Power Ltd v Waikato Regional Council*; *Royal Forest and Bird Protection Society Inc v Central Otago District Council* EnvC Auckland A128/2004, 23 September 2004.

[64] Mr van der Wal further submits this amounts to a fundamental misinterpretation of s 6(c) and was material because it resulted in the Court deleting the word "important" from the draft "ecological context" criterion and also resulted in it refusing to insert a relativity-based threshold in its formulation of the representativeness criterion. The absence of a threshold or relativity-based qualifier (such as "high" representative value or "one of the best of") means, according to Mr van der Wal's analysis, that there is no means of distinguishing the common and unremarkable from the stand-out. That is said to be contrary to the dictionary definition of "significant" and the intention of s 6(c), which Mr van der Wal argues contemplates the "significant" subset to be a limited group.

[65] Without qualifiers, the criteria are said to be incapable of ensuring that the wetlands identified as significant are truly significant in light of the regional extent and vulnerability of the resource, incapable of ensuring that wetlands identified as significant are exceptional or particularly important when compared with like wetlands in the region, and incapable of excluding wetlands of comparatively lower regional importance or significance, thereby preventing the West Coast community from being able to provide for their social, economic and cultural wellbeing through use and development of such areas.

Discussion

[66] The dictionary definition of the word "significant" is "sufficiently great or important; to be worth attention".[16]

[67] I accept, as indeed do all the respondents, that significance is a relative term.

[68] I do not, however, accept that the Court failed to appreciate this. In my view, what the Court was essentially saying at [42] of its judgment was that significance should not be determined by reference to numbers or class size, but rather value. In other words, it was not a rejection of relativity per se, but rather a rejection of relativity as defined by the Regional Council. In my view, the Court's approach is entirely consistent with the dictionary definition.

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[16] Oxford Dictionary of English (2nd ed, Oxford University Press, Oxford, 2003).

[69] As Mr van Mierlo points out, the evidence established that not all West Coast wetlands will meet the Court's criteria. The criteria which the Court ultimately adopted were in substance the criteria advocated by the respondents, and the Court had the benefit of maps identifying those wetlands which would meet the criteria and those which would not. The criteria thus demonstrably do contain a relativity standard that will filter out wetlands not of sufficient ecological importance within the region to be recognised as significant.

[70] The approach taken by the Court was an approach that was clearly open to it on the evidence. In my view, any attempt to argue otherwise is in substance an attempt to relitigate the merits, and that is something which the authorities say cannot be done on an appeal to this Court.

Is s 6 subject to s 5, and if so did the Court fail to recognise this in interpreting and applying s 6?

[71] Both ss 5 and 6 are contained in Part 2 – Purpose and principles.

[72] Section 5 states:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[73] Mr van der Wal argued that in applying s 6, the Court failed to have regard or sufficient regard to the overarching purpose of s 5 and the recognition in s 5(2) that

protection and enabling are equally important. In his submission, the effect of s 5 is that the word "significant" as it appears in s 6(c) must be interpreted so as to denote a high threshold. It must be reserved for the exceptional so as to ensure overall that enabling remains as important as protection. Otherwise, if s 6 is read in isolation from s 5 (as he contends was done by the Court in this case), protection wrongly becomes the sole objective and primary purpose of s 6 and the consent authority is hindered from giving proper effect to the enabling function of s 5 through the provisions of its Regional Plan.

[74] I accept that s 6 is subject to s 5[17] and that the enabling and management requirements of s 5 (of which protection is a part) are of equal importance.[18]

[75] However, I do not accept that the Court in this case has erred in its reasoning.

[76] I have come to that conclusion for the following reasons:

(a) The Court was in fact mindful of s 5. One of the key reasons given by the Court for rejecting the Regional Council's preferred criterion was that it would "impose a significant burden on the first applicant for resource consent, its approach would not enable people or communities in relation to their use of natural and physical resources".

(b) The case law does not support the addition of a gloss such as "very" or "highly" to the word "significant". What authority there is would seem to contradict such an interpretation. Thus, for example, in *Minister of Conservation v Western Bay of Plenty District Council* the Court held it was inappropriate to exclude moderate sites which were still considered to warrant protection by the expert ecologists.[19]

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17 *Meridian Energy Ltd v Wellington City Council* EnvC Wellington W031/2007, 14 May 2007; *Auckland Volcanic Cones Society Inc v Transit New Zealand Limited* [2003] NZRMA 316 (HC).

18 *Kiwi Property Management Ltd v Hamilton City Council* (2003) 9 ELRNZ 249 (EnvC) at [42].

19 *Minister of Conservation v Western Bay of Plenty District Council* at [31] and [35]; see also *Mighty River Power v Waikato Regional Council.*

(c) The criticism overlooks the fact that this was only an interim decision in which the Court was solely concerned with the identification or recognition of significant indigenous vegetation or fauna, not how the areas would be protected. That is the function of the objectives, policies and methods yet to be finalised and the subject of a further hearing.

(d) It is at that stage and at the consent processing stage that s 5 considerations primarily come into play. It is not the law that the planning authority or the Environment Court on appeal must assess areas against the requirements of s 5 before it can conclude that they are significant in terms of s 6(c). As the respondents submitted, neither case law nor the Interpretation Act 1999 require such a construction which would be both impractical and result in a double-counting of the balancing required under s 5: once at the plan preparation stage, and then again in the process of considering an application for resource consent.

[77] I also do not accept on the evidence that the Court's approach will in fact frustrate or hinder the Regional Council's ability to give proper effect to the enabling purpose of s 5. Mr van der Wal's argument appears to assume that as a result of the Court's decision, all West Coast wetlands will qualify as significant, and once classified as significant will be absolutely protected.

[78] However, the Regional Council did not call any evidence as to how its preferred approach would enable the West Coast community in terms of s 5, and as I have already mentioned, the evidence that was before the Court does not support the conclusion that all West Coast wetlands will fall within the criteria. The evidence was in fact to the contrary. Not all West Coast wetlands will meet the criteria. Further, classification as significant does not equate to absolute protection. Activities affecting a Schedule 2 significant wetland are to have a discretionary activity status.

Conclusion

[79] As will be readily apparent, Mr van der Wal has said all that could possibly be said on behalf of the Regional Council. However, I am satisfied that correctly analysed, the decision of the Environment Court does not contain any errors of law such as would warrant appellate intervention.

[80] The appeal is therefore dismissed.

Costs

[81] As regards costs, my expectation is that the parties will be able to agree on costs. If, however, agreement cannot be reached and I am required to make an award then I direct the respondents to file submissions within 10 working days with any response within 10 working days thereafter.

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