IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA637/2021
[2022] NZCA 189

BETWEEN	CABLE BAY WINE LIMITED Applicant
AND	AUCKLAND COUNCIL Respondent

Court:	Cooper and Dobson JJ
Counsel:	A G W Webb for Applicant S F Quinn and K H Rogers for Respondent
Judgment: (On the papers)	17 May 2022 at 9 am

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The applicant, Cable Bay Wine Ltd (Cable Bay), challenges a decision of the Environment Court regarding resource consents. Cable Bay unsuccessfully appealed the Environment Court's decision to the High Court, and now seeks leave to appeal to this Court.[1]

---

[1] *Cable Bay Wine Ltd v Auckland Council* [2021] NZHC 2596 [High Court judgment].

[2] The Environment Court decision was made on an appeal filed after Auckland Council had refused an application by Cable Bay in 2017 for resource consent for certain activities that were being carried out on Cable Bay's property on Waiheke Island, where it operates a winery and hospitality business.[2] The effect of the Environment Court decision was to grant consent for some of the activities subject to conditions.[3] Cable Bay's appeal to the High Court challenged the lawfulness of some of the conditions imposed by the Environment Court.

[3] It was argued in the High Court that some of the conditions were unlawful because they purported to control activities which Cable Bay was already authorised to undertake under an earlier consent, granted in 2006. It was said that in the circumstances the Environment Court had no jurisdiction to impose conditions purporting to control those activities. It was also argued that, even if there were jurisdiction, the conditions were substantively unreasonable.

[4] Campbell J rejected both contentions.[4] The present application for leave to bring a second appeal seeks to pursue both issues.

Second appeal principles

[5] The Resource Management Act 1991 (RMA) provides for second appeals to this Court in s 308(1). It does so by adopting sub-pt 8 of pt 6 of the Criminal Procedure Act 2011. That includes s 303 which provides:

> **303 Right of appeal against determination of first appeal court**
>
> (1) A party to a first appeal under this subpart may, with the leave of the second appeal court, appeal under this subpart to that court against the determination of the first appeal.
>
> (2) The High Court or the Court of Appeal must not give leave for a second appeal under this subpart unless satisfied that—

---

2 The Environment Court issued four interim decisions before delivering its final decision: *Cable Bay Wines Ltd v Auckland Council* [2018] NZEnvC 226; *Cable Bay Wines Ltd v Auckland Council* [2019] NZEnvC 29; *Cable Bay Wines Ltd v Auckland Council* [2019] NZEnvC 170; *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 75; and *Cable Bay Wine Ltd v Auckland Council* [2020] NZEnvC 154 [Final Environment Court decision].

3 Final Environment Court decision, above n 2.

4 High Court judgment, above n 1.

(a) the appeal involves a matter of general or public importance; or

(b) a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[6] As can be seen, this Court must not give leave for a second appeal unless satisfied that the appeal involves a matter of general or public importance, or a miscarriage of justice may have occurred or may occur unless the appeal is heard. As will generally be the case, the miscarriage ground has no relevance here where the context is not criminal.[5] Because the appeal is a second appeal, and an appeal to the High Court from the Environment Court is limited to questions of law,[6] it is axiomatic that any subsequent appeal to this Court must also be on a question of law.

[7] But it is not sufficient simply to state a question of law. The question must be one which is capable of bona fide and serious argument. That was confirmed in the context of resource management appeals by this Court in *Te Whare O Te Kaitiaka Ngahere Inc Society v West Coast Regional Council*.[7] So the controlling qualifications for a second appeal are that it involves a question of law capable of bona fide and serious argument, and that it is of general or public importance.[8]

The disputed conditions

[8] The conditions imposed by the Environment Court that remain in dispute were numbered 12 to 15 in that Court's decision.[9] It is not necessary for present purposes to set them out. In broad terms they required provision of a designated alfresco dining area adjacent to the restaurant, a designated area for weddings on a defined part of the site (subject to various limitations) and a designated short-term viewing area where patrons could take photographs or "take in the view".

---

5 *SKP Inc v Auckland Council* [2020] NZCA 610, (2020) 22 ELRNZ 268 at [25], citing *Tan v Chief Executive of the Ministry of Social Development* [2017] NZCA 369 at [8]–[10].

6 Resource Management Act 1991, s 299(1).

7 *Te Whare O Te Kaitiaka Ngahere Inc Society v West Coast Regional Council* [2015] NZCA 356 at [23].

8 *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398 at [20].

9 See, for example, Final Environment Court decision, above n 2, at [19]. In the High Court a more extensive challenge was mounted: of the 71 conditions imposed, 41 were said to be unlawful or unreasonable.

[9] The principal argument raised in the High Court was that the Environment Court had exceeded its jurisdiction by imposing conditions that sought to control activities for which Cable Bay had obtained consent in 2006 and for which it was not seeking consent in its subsequent application made in 2017. It was contended that the consent issued in 2006 had authorised, amongst other things, the operation of a restaurant, and patrons using the adjacent lawn to walk and take in the views. It was said the Environment Court had failed to appreciate that the use of the lawn was authorised by the 2006 consent.

[10] Campbell J held that the Environment Court had correctly proceeded on the basis that the 2006 consent had not authorised the use of the lawn to walk and take in the views.[10] Essentially this was because although the plans that had accompanied the resource consent application in 2006 had shown that patrons would be using the lawn, that activity was permitted under the relevant provisions of the operative district plan at the time. Consequently, no consent was required and the permitted activity of using the lawn did not form part of the activities authorised by the 2006 consent.[11]

[11] The Judge rejected an argument advanced by Mr Webb for Cable Bay based on *Marlborough District Council v Zindia Ltd* and *Arapata Trust Ltd v Auckland Council* that Cable Bay's authority to use the lawn was derived from the 2006 consent even though resource consent had not been required for it.[12] The Judge said:[13]

> [105] In those circumstances the permitted activity of using the lawn did not form part of the activities authorised by the 2006 Consent. The authorities on which Mr Webb relied do not support his submission. *Arapata* is authority for the proposition that a resource consent authorises an activity rather than a breach of a rule. That is not on point because, in this case, the question is what activity the 2006 Consent authorised. *Zindia*, a judgment of Doogue J, includes a discussion of the concept of "bundling", which provides that where a particular land use comprises multiple activities each of which requires resource consent, the least favourable activity classification applies to all of the activities. The concept of bundling is used for the purposes of notification decisions and effects assessments. The concept does not mean that, where resource consent is granted for a proposal that includes both permitted and non-permitted activities, consent is granted for the permitted activities. ...

---

10 High Court judgment, above n 1, at [104].

11 At [104]–[105].

12 At [103]–[104], citing *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765, [2020] NZRMA 216; and *Arapata Trust Ltd v Auckland Council* [2016] NZEnvC 236.

13 High Court judgment, above n 1 (footnotes omitted), citing *Housing New Zealand Corporation v Auckland City Council* (2007) 14 ELRNZ 52 (EnvC) at [8].

> [106] For those reasons, which reflect the submissions of Mr Quinn, the Environment Court did not err in finding that patrons using the lawn to walk and take in the views was not authorised by the 2006 Consent.

[12] In the circumstances, the Judge considered that the conditions had been lawfully imposed, because they fairly and reasonably related to the activities authorised by the Environment Court consent.[14]

The application for leave

[13] The application for leave to appeal proffers two questions.

First question

[14] The first question, said to address the "jurisdictional issue", would ask:

> When does a resource consent protect permitted aspects of a proposal from changes to planning provisions which change the status of that use?

[15] We observe first that the question is couched in terms which are too general for the purposes of a second appeal on a question of law. The question would essentially require this Court to give an advisory judgment rather than focus on a specific issue relevant to the High Court judgment.

[16] The question is based on the same authorities relied on in the High Court, the application of which was rejected by the Judge in the passage quoted at [11] above. Mr Webb contends that the High Court judgment is inconsistent with that Court's judgment in *Marlborough District Council v Zindia Ltd.* However, we do not consider that is a seriously arguable proposition. The Judge determined that the use of the lawn had not been permitted by the 2006 consent. And we agree with his assessment that the judgment in *Zindia* does not imply that where resource consent is granted for a proposal which includes both permitted activities and those that require a resource consent, the consent grants consent for the permitted activities. We regard the case as contemplating that all activities proposed in an application will be assessed holistically, to assess the effects of granting consent to the proposal. But the consent

---

[14] At [117], [119(a)] and [122].

granted to the whole does not mean that those elements that are permitted activities are also granted consent.[15]

[17] If a district or regional plan does not expressly allow an activity, a resource consent will be required to carry it out: otherwise there would be a breach of s 9(1) or (2) of the RMA. However, it is axiomatic that a resource consent cannot be granted for an activity which does *not* contravene the prohibition in s 9. This is why s 87(a) gives as one of the relevant meanings of the term "resource consent" that it is "a consent to do something that otherwise would contravene section 9". And that is also why s 87A(1) states that if an activity is described in the Act, regulations, or a plan or a proposed plan as a permitted activity, "a resource consent is not required for the activity".

[18] In the present case there is no doubt that the Judge properly concluded that the district plan permitted the use of the lawn at the time of the 2006 consent. It is clear therefore that consent was not granted for that use. It took place as of right. These considerations mean that the question proposed by Cable Bay is predicated on an incorrect proposition that the 2006 resource consent permitted the activity.

[19] Where resource consent is granted for an activity which includes as part of it activities which do not require a resource consent, the latter may acquire protection against subsequent changes to the plan as existing uses under s 10 of the RMA. Under s 10(1), land may be used in a manner that contravenes a rule in a district plan or proposed district plan if the use was lawfully established before the rule became operative or the proposed plan was notified, and the effects are of the same or similar character, intensity and scale to those which existed before the change to the rule or plan. But in such a case the protection arises from the terms of s 10 and not because the activity is to be treated as having been the subject of a previously granted resource consent.

[20] That, of course, is not the argument which Mr Webb seeks to advance here. In fact, as the Judge noted, in the Environment Court Cable Bay "explicitly eschewed

---

15 *Marlborough District Council v Zindia Ltd*, above n 12, at [67].

reliance on existing use rights", and in the High Court counsel again did not suggest Cable Bay had any existing use rights for the lawn activity.[16]

[21] For these reasons we do not consider the first question raises a question of law capable of bona fide and serious argument and we will not grant leave in respect of it.

Second question

[22] The proposed second question would ask:

> Did the High Court err in law in failing to consider whether a condition imposing restrictions on the use of land to control the effects of an activity that occurs on a small portion of the site, on limited days each year, was so unreasonable that no reasonable consent authority would impose it?

[23] This question does not involve a matter of general or public importance. Although it is couched in terms which imply it is a question of law, really it is simply asking whether a condition (presumably one or all of conditions 12 to 15) was unreasonably imposed. That is not an appropriate question of law for a second appeal.

Result

[24] The application for leave to appeal is declined.

Solicitors:
Russell McVeagh, Auckland for Applicant
DLA Piper, Auckland for Respondent

---

16 High Court judgment, above n 1, at [101], n 76.