AHM News

INTRODUCTION

In this newsletter we provide a detailed case note on the Court of Appeal decision regarding the tree felling and replanting on Ōwairaka/Mt Albert which was recently released. We also say farewell to our solicitor Tom Gray as he and his family move overseas.

NORMAN v TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY [2022] NZCA 30

The Court of Appeal has allowed in part an appeal against decisions of the Tūpuna Maunga Authority, which administers Ōwairaka/Mt Albert under the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014, and the Auckland Council.

The decisions relate to part of the Authority's proposal to make significant changes to the vegetation on Ōwairaka, including by removing 345 exotic trees and planting 13,000 indigenous trees and plants on the maunga.

The appellants had previously sought judicial review in the High Court of the Authority's decision to remove the trees, and of the Council's decision that the relevant resource consent applications could be determined without being publicly notified or subject to limited notification under the Resource Management Act 1991.

That application for judicial review was rejected by the High Court. On appeal to this Court, the appellants argued that:

(a) the Authority's decision to remove the trees breached the Reserves Act 1977;

(b) the Authority had not carried out the consultation required by statute; and

(c) the application should have been publicly notified under the RMA. The appellants succeeded on their second and third grounds of appeal.

The appellants for the most part re-ran their arguments from the High Court. Of the 18 claims made by the appellant, three were accepted.

Breach of the Reserves Act

The basis of the first ground of appeal is that the decision to remove the exotic trees breached the Authority's obligations under ss 17 and 42 of the Reserves Act.

Section 17 first provides that the provisions in the Act are for "the protection of the natural environment and beauty of the countryside". Section 17(2)(c) then goes on to provide that the recreation reserve must be "so administered … that … those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved". The appellants argued that the decision to remove the exotic trees, being healthy and attractive specimens, falls outside these statutory purposes.

The High Court found in favour of the Authority after reading s 17 in light of the broad powers provided for under the Collective Redress Act and held that the section contained "high level" principles which cannot be read as absolute requirements of law. The Court of Appeal agreed with the High Court and, in light of s 17 of the Reserves Act, held that the interrelationship between the two Acts is such that it cannot tenably be claimed that s 17(2)(c) of the Reserves Act requires preservation of the existing nature of the vegetation on the maunga. The Court therefore held that decision was not unlawful by way of breach of s 17.

As to the claim of breach of s 42 of the Reserves Act, the High Court accepted that the Reserves Act did not require a particular documented decision to be made under s 42(2) confirming that the felling of trees was necessary, and found that the Authority had acted within its powers.

The Court of Appeal also agreed here and found that the removal of the exotic trees was a legitimate response to the objectives sought to be achieved by the Collective Redress Act and noted that it could not be seriously argued that the Authority had acted for an improper purpose. Subsequently this first ground was dismissed in its entirety.

Consultation

The second ground of appeal is based on the assertion that the Authority was required to consult interested members of the Auckland public, including those in the position of the appellants, prior to making the decision to fell and remove the exotic trees.

The High Court had held that there was no express statutory duty to consult beyond that in relation to the draft Integrated Management Plan (**IMP**) and the draft Annual Operational Plan. The High Court then rejected the argument that the appellant had a legitimate expectation of consultation deriving from either a promise, past practice or a combination of the two.

The Court of Appeal agreed, noting that there was no commitment to undertake further consultation, no evidence of a clear promise that the Authority would consult further prior

to removal of the exotic trees, and that the High Court had correctly found that this was not an appropriate case for relief to be granted on the basis of a breach of legitimate expectation.

However, the Court of Appeal found that the question turned on whether the decision to fell the trees was one which should be characterised as sufficiently important to have been the subject of consultation due to the statutory context.

The Court of Appeal first agreed that the High Court was correct to find no statutory consultation requirement outside those required in preparing and approving the IMP and Annual Operational Plan process. However, the Court then imported a new 'significance test' and ultimately held that the proposed removal of all exotic trees on Ōwairaka, and revegetation with indigenous fauna, was a proposal of such significance that it needed to be provided for in the IMP. That would ensure appropriate, informed, public consultation about the proposal.

The proposal to remove the trees was found to not be made plain in the initial IMP as the Court provided that the management of plant pests and inappropriate exotic vegetation could not reasonably be understood to mean the removal of all exotic trees. No IMP for Ōwairaka setting out the proposal had been prepared. As a result, the public consultation that took place did not properly inform the public about what was intended.

The Court therefore held that the decision to fell the trees is to be set aside.

Notification

The appellants argued in the High Court that the Council had unlawfully granted resource consent without requiring the application to be publicly notified or, alternatively, without requiring limited notification to the users of the reserve.

However, the High Court concluded that the Council did have sufficient relevant information before it in order to make the notification decision on an informed basis. It was even noted that the Court took "confidence in the breadth and depth of the expertise and information" which was available to the Council for the purposes of the notification decision.

As in the High Court, the appellants again argued in the Court of Appeal that the non-notification decision was based on inadequate information, applied the incorrect test by taking into account positive prospective effects of the proposed planting project, and was unreasonable.

The appellants also re-ran the argument that the felling and replanting were separate activities. The High Court had held that the activities were part of the same project and to separate them would be artificial. The Court of Appeal agreed and found that the High Court was correct to hold that the focus is on the application as a whole.

The Court of Appeal did not find any errors in the High Court's judgement of these arguments but still concluded that the decision not to notify was flawed in two respects. The first was in relation to the manner in which the Council dealt with the issue of the temporary effects of the tree removal, and the second concerned the heritage and historical significance of some of the trees.

Regarding the temporary adverse effects, it was accepted that there would be a period for which the current amenity of Ōwairaka would be adversely affected by the removal of the trees for whatever period must elapse before the new planting becomes established.

In discussing the Authority's argument that the adverse effects would be effectively mitigated over time the Court of Appeal did not accept that approach and maintained a stance that an adverse effect does not cease to be an adverse effect merely because it is short term. Ultimately, it was held that there was insufficient evidence before the original decision-makers to properly conclude as to the nature and duration of the adverse effect between felling and replanting. The temporary effects were identified as adverse, however, as the resource consent did not provide any timescales to be met it was held that these effects were taken into account in any meaningful way.

The consequence of non-notification was that such possibilities could not be explored in the absence of the issues being drawn to the attention of the decision maker.

The Court of Appeal therefore held that the application should have been notified.

Held

The Court of Appeal found that the required consultation was not carried out, and the application should have been publicly notified under s 95A of the Resource Management Act. Accordingly, the Court of Appeal set aside the Authority's decision to fell and remove the exotic trees on Ōwairaka and the Council's decision to grant resource consent for the felling and removal of the exotic trees.

Leave to appeal this decision to the Supreme Court has now been applied for by the Authority.

We also note the involvement in this case of Paul Majurey, Director at AHM, as Chair of the Authority.

AHM NEWS

Earlier this month we farewelled Tom Gray, who has left Atkins Holm Majurey to move to England with his family. Tom has secured a job at a leading planning law firm in Bristol. Tom started with AHM in January 2019 as a law clerk before being admitted in October that year. His enthusiasm, sense of humour, and contributions to AHM will be missed by all. We wish Tom and his family all the best for their move.

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 :

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Tom Gray was also an author of this publication.

We welcome your feedback!

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