IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-001157
[2017] NZHC 865

BETWEEN	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Appellant
AND	CHRISTCHURCH CITY COUNCIL Respondent
AND	INDEPENDENT HEARINGS PANEL First Third Party
AND	CANTERBURY REGIONAL COUNCIL Second Third Party
AND	FEDERATED FARMERS OF NEW ZEALAND Third Third Party
AND	LYTTELTON PORT COMPANY Fifth Third Party

Hearing: 3 May 2017 (On the papers)

Appearances: P Anderson S Gepp for Appellant
M G Conway and C G Coyle for Respondent
No appearance for First Third Party (abides decision of the Court)
M A Mehlopt for Second Third Party
R Gardner for Third Third Party
J M Appleyard for Fifth Third Party

Judgment: 3 May 2017

JUDGMENT OF DUNNINGHAM J

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[1] This decision addresses the remaining alleged error of law alleged by the appellant to arise in Decision 50, Chapter 9: Natural and Cultural Heritage (Part) Sub-Chapter 9.1 – Indigenous Biodiversity and Ecosystems (the Decision) made by

the Independent Hearings Panel (the Panel), on the Christchurch Replacement District Plan (the Plan).

[2] The balance of the alleged errors of law were resolved by agreement, and those agreements were recorded in the consent orders confirmed in the judgment I issued on 7 April 2017 (the April judgment).[1] This judgment should be read in conjunction with the April judgment.

[3] Following the April judgment, the only unresolved issue on appeal was the seventh alleged error of law which related to the extent to which farm practices were relevant to determining whether an area was a significant ecological site (SES).

Parties

[4] The Decision was appealed by the Royal Forest and Bird Protection Society of New Zealand Incorporated (Forest and Bird). The respondent is the Christchurch City Council (the Council). The other parties to the appeal are the Canterbury Regional Council, the North Canterbury Province of Federated Farmers of New Zealand Inc, and the Lyttelton Port Company Limited. The Panel is also named as a party in the appeal but has indicated it will abide the decision of the Court.

Background

[5] The background to the appeal was outlined in full at [6]-[23] of the April judgment and will not be repeated here. It is sufficient to say that this appeal concerned Sub-Chapter 9.1 of the Plan which was intended to implement Chapter 9 of the Canterbury Regional Policy Statement (CRPS) and set out the way in which the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna is to be carried out in Canterbury.[2] The Sub-Chapter establishes the framework for the identification, assessment, management and protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna within the Council's district. The remaining issue on appeal is whether the

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1 *Royal Forest and Bird Protection Society of New Zealand Inc v Christchurch City Council* [2017] NZHC 669.

2 As required under s 6(c) Resource Management Act 1991.

Panel has erred in law in its incorporation of references to land use practices in the policy which governs the assessment of significance and the determination of SES boundaries.

[6] The parties to this appeal engaged in mediation during the Plan hearings, and have continued to engage in settlement discussions since the appeal was filed. This reflects a willingness between these groups to work collaboratively to ensure the provisions of the Plan accurately reflect the relevant higher order documents, and also provide a practical and workable set of Plan rules. The proposed resolution to this appeal is the outcome of further mediation between the parties.

[7] During the Plan hearings the parties to this appeal reached agreement that assessment of significance of potential SES and the determination of the boundary of those sites was to be assessed on an ecological basis only. That position was reflected in the version of Chapter 9.1 that was circulated by the Council on 24 March 2016 where Policy 1, relating to identification of ecological significance, made no reference to farming practices. Similarly, after considering further submissions, the Panel directed the Secretariat to redraft Chapter 9.1. In that redraft, policy 9.1.2.4 made no reference to land use practices in the determination of significance. There was, however, reference to land use practices in policy 9.1.2.3 of the redraft which referred to understanding the relationship between land use practices, and the protection of SES, when implementing mechanisms for the protection of indigenous biodiversity.

[8] After receiving further closing submissions, the Panel issued its decision on 21 October 2016. The Panel removed the reference to land use practices from policy 9.1.2.3, but added it to policy 9.1.2.4 as follows:

> ***9.1.2.4 Policy – Determination of significance***
>
> a. Properly informed by the assessment and identification of sites of indigenous vegetation and habitats of indigenous fauna in accordance with Policy 9.1.2.3 *and an understanding of the relationship between the protection of areas and land use practices,* the Council will determine whether those sites are

> significant, in accordance with the criteria and Canterbury Regional Policy Statement Policy 9.3.1 and Appendix 3, and warrant protection by listing in Schedule A of Appendix 9.1.6.1.
>
> …
>
> (emphasis added)

[9] The addition of the reference to land use practices in policy 9.1.2.4 is the basis of the seventh alleged error of law raised in this appeal by Forest and Bird. Forest and Bird says that the Panel failed to give effect to the New Zealand Coastal Policy Statement (NZCPS), CRPS and misapplied s 6(c) of the Resource Management Act 1991 (RMA), when it concluded that farm practices played a part in the determination of the boundary of significant ecological sites.

[10] The Panel's drafting of policy 9.1.2.4, was supported by the text of the Decision and, in particular, paragraph 69 where it said:

> [69] … related to that, we do not agree with the Crown's proposition that the determination of the boundaries of a SES cannot take account of practical farming considerations. As we have explained, we find policy 9.3.1 is clear that areas identified as significant, according to its prescribed assessment approach, are to be protected. However, that does not necessarily mean practical farming considerations are irrelevant to the assessment and determination of boundaries. As we have noted, Appendix 3 includes several words of evaluative judgment, including 'relatively large' and 'important'…

[11] Similar views are expressed at [205]-[210] of the decision.

The position of the parties to the appeal

[12] The parties agree that the correct approach, as directed by the higher order documents such as the NZCPS and CRPS, is that the significance of an area of indigenous vegetation or habitat of indigenous fauna is determined by an ecologist, as noted by the first line of policy 9.1.2.4. The parties consider that land use practices are not relevant to that step. Instead, the relevance of land use practices is limited to the next step, where the Council determines the appropriate ways to manage such sites. This position is consistent with policy 9.3.1 of the CRPS, Policy 11 of the NZCPS and recent caselaw regarding s 6(c) of the RMA.

[13] The parties consider that the Decision version of policy 9.1.2.4 does not clearly make this distinction, and, because the policy is ambiguous, it requires amendment to ensure that the distinction between the determination of significance, and then the appropriates steps to maintain and protect such indigenous biology, is clearly made in order to give effect to the CRPS, NZCPS and to achieve s 6 of the RMA.

[14] The parties consider that the proposed clarification of policy 9.1.2.4 is consistent with:

(a) the Supreme Court's decision in *King Salmon*;[3]

(b) Policy 9.3.1 of the CRPS (where the significance of ecosystems and indigenous biodiversity are to be assessed against ecological matters, with no reference to land use practices); and

(c) Policy 11 of the NZCPS which does not provide scope for the consideration of farming practices when assessing whether a site contains significant values.

[15] Furthermore, the parties' memorandum points out that the Courts have consistently held that whether a site is significant, and so triggers the requirement to protect under s 6(c), is an ecological assessment and is not to be conflated with management or planning considerations. For example, in *Friends of Shearer Swamp v West Coast Regional Council*, the Environment Court held that some of the work done in compiling the Council's list of significant sites was effectively making the RMA Part 2 evaluation and trade-offs prior to when it should be made, and that this confused management and planning considerations with the merits of ecological values.[4] On appeal, the High Court agreed with the Environment Court that the proper place for providing the protection of SES was not in the identification of sites that are significant, but in the objectives, policies and methods.[5]

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3 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

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

5 *West Coast Regional Council v Friends of Shearer Swamp Inc* [2012] NZRMA 45 (HC).

Proposed resolution of appeal

[16] In light of the background and explanation given, the parties have agreed to an amendment to policy 9.1.2.4 in order to resolve the seventh alleged error of law which is the remaining issue on appeal. This is on the basis that three of the parties, the Canterbury Regional Council, Federated Farmers and the Lyttelton Port Company do not express a view on whether the Panel's decision did err in law, but simply abide the decision of the Court.

[17] The amended wording for Policy 9.1.2.4 is as follows:

> ***9.1.2.4 Policy – Determination of significance***
>
> (a) Significance of indigenous biodiversity will be determined by:
>
> (i) the identification and assessment of areas of indigenous vegetation and habitats of indigenous fauna in accordance with the process in Policy 9.1.2.3; and
>
> (ii) the assessment of these areas against the significance criteria in the Canterbury Regional Policy Statement Policy 9.3.1 and Appendix 3.
>
> (b) Following the identification and assessment of significance undertaken in (a) above, the Council will determine the extent of those areas identified as significant and warranting protection.

[18] The parties acknowledge that the proposed reworded policy is structured differently from that in the decision but consider that the changes improve structure and readability and, apart from the deletion of the reference to land use practices, do not change its meaning.

[19] The parties also agree that reference to land use practices can properly be added to policy 9.1.2.5, as identified in the additional underlined wording as follows:

9.1.2.5 Policy – Mechanisms for the protection of indigenous biodiversity

(a) Recognise that the maintenance and protection of indigenous biodiversity, including the Sites of Ecological Significance listed in Schedule A of Appendix 9.1.6.1, is dependent on landowner support and will be achieved through a number of mechanisms, including:

(i) the listing of sites of significant indigenous vegetation and significant habitats of indigenous fauna in Schedule A of Appendix 9.1.6.1;

(ii) the use of rules regulating the clearance of indigenous vegetation and the disturbance of indigenous habitats;

(iii) legal protection by way of covenants; and

(iv) landowner commitment to conservation and stewardship of the natural environment, including through the use of Farm Biodiversity Plans;

and that the most appropriate mechanism may vary depending on the indigenous biodiversity and use of the particular site, <u>including by way of an understanding of how land use practices on the site assist with management, maintenance and protection of indigenous biodiversity values</u>.

Orders sought

[20] As in the April judgment, I note that the High Court has jurisdiction to make the orders sought by the parties to this appeal.[6]

[21] Having considered both the materials and explanation provided prior to issuing the April judgment, and the present joint memorandum of the parties explaining the reasons for seeking the proposed amendment to policies 9.1.2.4 and

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6 In accordance with r 20.19 of the High Court Rules.

9.1.2.5, I am satisfied it is appropriate to make orders that the Plan be amended as set out in paragraphs 40 and 42 of the joint memorandum signed by all parties to the appeal (save for the Panel, which abides the decision of the Court), and which are set out at [17] and [19] of this judgment above.

[22] The reasons I consider it appropriate to make these orders are:

(a) the amendments sought are within the scope of the appeal;

(b) the proposal to settle the appeal by making the amendments proposed represents a just, speedy and inexpensive way of determining this proceeding. This consideration takes on particular importance given that the Plan is made in accordance with provisions of the Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 which was to provide an expedited process for replacing the District Plan in order to support recovery and rebuilding in the Canterbury area;

(c) the proposed orders are not opposed by any party joined to the proceedings and I consider those parties represent a reasonable cross-section of the community. Furthermore, persons who might have an interest in the appeal have had an opportunity to participate in the substantive first instance hearing process, and through service of the notice of appeal;

(d) I consider the proposed amendments are consistent with the purposes and principles of the RMA including, in particular, s 6(c) of Part 2 and give effect to the NZCPS and the CRPS, as required under s 75 of the RMA;

(e) the reasons are also consistent with the position reached in the mediation report dated 16 March 2016, where it was agreed that SES boundaries should be determined solely on an ecological basis, leaving the planning assessment which relates to the appropriate level

of protection, that is, what rules should apply to the SES, to the next stage of consideration where land use practices may be relevant.

[23] I also accept that, given the narrow scope of relief jointly requested, it is not necessary to remit the matter back to the Panel for determination.

[24] Accordingly, I order that Policy 9.1.2.4 and Policy 9.1.2.5 of the Decision be amended as set out in [17] and [19] above.

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