

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2015-485-178
[2015] NZHC 532**

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Resource Management Act 1991
BETWEEN	ARO VALLEY COMMUNITY COUNCIL INCORPORATED Plaintiff
AND	WELLINGTON CITY COUNCIL First Defendant
	ARO HOLDINGS LIMITED Second Defendant

Hearing: 13 March 2015

Counsel: T H Bennion for Plaintiff
K M Anderson and A E Cornor for First Defendant
J W Maassen for Second Defendant

Judgment: 23 March 2015

RESERVED JUDGMENT OF MACKENZIE J

*I direct that the delivery time of this judgment is
3 pm on the 23rd day of March 2015*

Solicitors: Bennion Law, Wellington, for Plaintiff
DLA Piper, Wellington, for First Defendant
Cooper Rapley, Palmerston North, for Second Defendant

[1] This is an application for an interim order that the second defendant not take any action in respect of a property at 88 Aro Street Wellington consequent upon land use consents issued by the first defendant on 30 September 2014, pending the hearing of an application for judicial review of the decision to grant the consent.

[2] The second defendant is the owner of the property at 86-96 Aro Street, on which there are a number of buildings. In July 2014, it applied to the first defendant (the Council), for several resource consents:

- (a) to subdivide land having regard to the existing buildings;
- (b) the demolition of an ancillary building on one of the sites;
- (c) to construct a new residential building on that site; and
- (d) to create two unit titles in that new building.

[3] The plaintiff became aware of the application and wrote to the Council requesting that the application be publicly notified. The Council considered the application. In a decision dated 30 September 2014, the Council decided that the application would be assessed on a non-notified basis, and it granted the application subject to certain conditions.

[4] On 27 February 2015, the plaintiff filed these proceedings for judicial review of the Council's decision. The application for interim relief is framed as an application for the interlocutory injunction under r 7.53 of the High Court Rules. The relief sought in the statement of claim falls within the scope of s 4 of the Judicature Amendment Act 1972. The plaintiff's application therefore falls to be dealt with as an application for interim relief under s 8 of that Act.

[5] The relief which may be granted under s 8 is relief which is necessary for the purpose of preserving the position of the applicant. The substantive relief sought by the plaintiff is the setting aside of the resource consent decision. It is therefore necessary to consider what is the plaintiff's position with regard to that decision.

[6] The approach of the Courts to the standing of a person to bring judicial review proceedings is generally to recognise the standing of a plaintiff who has an honest interest in and a bona fide and tenable claim concerning a public issue.¹ The plaintiff's standing to bring these judicial review proceedings, applying that quite liberal approach, is not in question here. However, it does not follow that the plaintiff's standing to review the decision gives it a position to preserve in respect of that decision. The plaintiff had no right to be heard by the Council on the resource consent application because of the Council's decision that it should proceed on a non-notified basis.

[7] Mr Bennion, for the plaintiff, formulated the plaintiff's position as being a right to be heard on a publicly notified application of the substantive application for resource consent, if the plaintiff's challenge to the decision to deal with the application on a non-notified basis is successful.

[8] The decision whether an application for a resource consent is to be publicly notified must be made by the consent authority under s 95A of the Resource Management Act 1991 (the Act). If an application for a resource consent is publicly notified, any person may make a submission about it under s 96 of the Act. I proceed on the basis that the right to make a submission if the application was publicly notified may give the plaintiff a position to be preserved in terms of s 8. It is however a very limited position, and that will be relevant to the assessment of what is necessary to preserve it. I apply the long established test in *Carlton & United Breweries Ltd v Minister of Customs* in undertaking that assessment.²

[9] With those general comments, I turn to consider the decision not to publicly notify the substantive application for resource consent.

[10] The second defendant's property is within the Aro Valley shopping centre heritage area. Chapters 20 and 21 of the Wellington City District Plan apply to it. The proposal to demolish the building with which this proceeding is concerned, is a Discretionary Activity (Restricted) under 21B.2.2 of the plan, with the discretion

¹ *Murray v Whakatane District Council* [1999] 3 NZLR 276 at 307 (CA).

² *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (HC and CA).

restricted to the effects of the proposal on historic heritage. The consent application described the building in these terms:

The proposal is to demolish a building that originates from prior 1900, which may impact on the heritage of the area. The building has a small footprint, is single storey with no openings to the street frontage. That is, it resembles a “shed” or ancillary outbuilding.

...

The heritage assessment reveals the history of the building which was used as a bakehouse in association with a local bakery shop. That is, the building was the production workplace to mix, knead and bake dough to create bread that was sold to the public from a nearby bakery shopfront.

...

While the building’s history reveals its use as a bakehouse, there are little if any remaining features that would indicate the historical use. The building has been modified significantly internally over the intervening years to remove the evidence of its original use.

[11] The applicant submitted with the application an assessment of heritage effects by Mr Bowman, an architect and conservator. Mr Bowman’s report discussed potential heritage values in these terms:

As a bakery, which may have been constructed at or prior to 1892, it may have archaeological values. It also has some minor historical values as bake house where items for sale were prepared by a local bakery, although it has been difficult to establish a clear history of the building.

The building has negligible architectural values as a purpose-designed bake house of timber frame, lean-to roof, clad with various materials, and of fair condition. Items to distinguish the building as a bakery have been removed and it is now used as rental accommodation.

The building has no clear scientific or technological qualities as it is a simple, practical, lean-to roofed design, presumably planned to suit a late 19th century bakery.

It is not known whether the structure is rare example of a late 19th century structure that was formerly a suburban bakehouse. 30 bakeries are listed in the New Zealand Cyclopedia of 1897 for the inner city. A study of how many of these structures survive or how many have since been constructed has not been carried out.

The building design is highly representative of outhouses of which there are many throughout the inner city and which have a simple utilitarian design with lean-to roof. As with this building, they are commonly clad with corrugated steel, cement sheet and/or timber weatherboards.

The Aro Street heritage area was listed for the values identified in appendix 1. These can be summarised as the area being a highly authentic, largely homogenous, late 19th century shopping area, which contains buildings representative of the styles, scales, details and materials of the era. The bakehouse contributes little to these heritage values as it is not similar to the other commercial buildings being single storey, of a different design and having little authenticity.

[12] The Council obtained its own heritage advisor assessment, from its senior heritage advisor, Mr Keppel. Mr Keppel, commenting on Mr Bowman's assessment, said:

... I agree with Mr Bowman's view that the building's former use is not readily apparent and appears more akin to a common outhouse. The various alterations to the building over time including blocking of street-facing openings, chimney flues, and extensions have certainly compromised the authenticity of the building. For these reasons, I have formed the view that the loss of the building would not have a significant adverse effect on the values of the heritage area. In my opinion, the effect of the loss of the building could be mitigated by an interpretative plaque on the side wall of 96 Aro Street, which could portray the former bakehouse and enhance the public understanding of the heritage area.

[13] He then expressed his conclusion in these terms:

The bakehouse at 96C Aro Street, whilst being an historic remnant of the Aro Valley, does not contribute greatly to the Aro Valley Shopping Centre Heritage Area. I consider that the building cannot be read as a former bakehouse and with the modifications that have occurred over time, it appears as a relatively generic weatherboard outbuilding. Whilst its loss will not have a positive effect on the heritage area, I consider that the introduction of an interpretative heritage plaque telling the story of the former bakery would be an appropriate mitigation whilst (sic) accommodating the needs of the landowner. Should this condition be met, I would support the demolition of this building on heritage grounds.

[14] The plaintiff apparently became aware of the application, and it seems must have had a copy of it. Mr Sapsford, a co-chair of the plaintiff, wrote to Mr O'Leary, the planner at the Council, on 5 September 2014 requesting that the resource consent application be publicly notified. He said in his letter:

...

The threshold test for public notification is that the effects are more than minor, and this application clearly passes this threshold in respect of the impact on the Aro Valley heritage area of both the proposed demolition and the proposed subdivision and new units.

...

The assessment of environmental effects (AEE) is deficient in its consideration of the effect of the proposal on the overall values associated with the heritage area and the heritage streetscape, largely focussing instead on the building in isolation. A central issue with this application however is the adverse effects on the heritage area as a whole.

Aro Valley heritage area clearly and deliberately includes the building behind 96 Aro Street which runs along Devon Street. The building, over 100 years old, originally served as a bakery, and is currently tenanted. The reason for inclusion of this site in a suburban centre-based heritage area, is that “the area is an excellent representative example of a late 19th century commercial centre in a working class neighbourhood”. As such, the heritage area helps to conserve the early 19th century streetscape. The heritage, character and amenity value of the Aro Valley suburban centre is significant both in its own right and in its contribution to the character, amenity and heritage values of Aro Valley as a whole.

...

The AEE seems to suggest that because the bakery has a different form to the buildings on Aro St it is of negligible importance. However this fails to recognise that both the existence of such an outbuilding and the contrast with the Aro St streetscape is a central component of the heritage area and forms an important element in defining the boundary between commercial and residential space on Devon St. This boundary has been unchanged for over 100 years and is a key element of the streetscape. The existing built form gives physical form to story of bakeries being separate from retail premises in a time before fire brigades were in existence.

In essence the existing building both tells its own story and embodies a crucial and longstanding transition between the heritage buildings of the Aro Valley Shopping Centre and the historic residential buildings along Devon Street. The value of the Devon St residential streetscape is recognised by its inclusion in the pre-1930s demolition role. From this perspective, the bakery building is a key component of the heritage centre and plays a pivotal role. Demolishing this building would result in the loss of an heritage building in a heritage area, and would open up the site for development, resulting in a breach of the continuous flow of heritage and character buildings going around the corner from Aro Street into Devon Street.

...

The proposed demolition, subdivision and new development would significantly affect the heritage, character and amenity value of the Aro Valley suburban centre. As such, the environmental effects of the proposed activities will be more than minor and will adversely affect a large number of people in Aro Valley. Aro Valley Community Council therefore requests public notification of the application.

[15] Mr O’Leary, acting under delegated authority, produced a report and decision dated 30 September 2014. In that decision, he dealt with both the decision and notification under s 95A of the Act, and the substantive application. His analysis of whether the decision should be notified or not, covering all four consents sought,

occupies some six pages. His analysis of the demolition of the building aspect of the notification issue is approximately one page. In that he summarised Mr Bowman's views and Mr Keppel's views and said:

Whilst it is acknowledged that the existing *bakehouse* building does still display some attributes which are consistent with or contribute to the heritage values of the Heritage Area, based on the advice of Mr Bowman and Mr Keppel, the loss of these attributes are not considered on the whole to be significant or to result in a more than minor effect on historic heritage.

[16] In his formal decision, under s 95A(2)(a) and 95D Mr O'Leary said:

Adverse effects on the environment are no more than minor and public notification is not required.

...

It is noted that neighbours and other interest parties have registered an interest in works occurring on the subject site. Neighbour interest does not deem them to be affected parties under the tests of the Act or qualify as special circumstances under the Act.

On this basis the application will be assessed on a non-notified basis.

[17] Mr Bennion for the plaintiff submits that in determining that the application for demolition could be decided without notification the Council made three errors. The first two relate to chapters 20 and 21 of the District Plan. Counsel submits that these assessment criteria contain strong statements about the preservation of heritage and require consents to demolish unlisted heritage buildings, which this is. The consent required is discretionary (restricted). The assessment criteria include 21B.2.2.6: "[w]hether it can be demonstrated irrefutably that no sustainable continued use of buildings within a heritage area is possible" and 21B.2.2.7: "[w]hether it can be demonstrated that a building proposed for demolition or relocation has no intrinsic heritage value and does not contribute to the significance of the heritage area".

[18] The plaintiff alleges that there is insufficient information on those aspects, in that on the first criterion there is no information beyond the applicant's comment that the building is in use as rental accommodation and that they are not to renovate, and on the second, that the Council decision does not explain how it considered the intrinsic heritage value of the building including possibly very high rarity value.

Counsel submits that important information is missing or unassessed on these matters. The plaintiff asserts that the policies and standards of the plan have indicated a very high degree of analysis will be required from the applicant for heritage assessment purposes and that this has plainly not occurred in this case.

[19] The third head of claim asserts that in deciding whether to notify the consent or not, the Council had to consider the application of part 2 and in particular s 6(f) of the Act, and that required an assessment on the notification decision of the historic heritage which is sought to be protected. The assertion is that the Council officer did not do that, but rather took an overall assessment approach, which Mr Bennion submits is contrary to that required by the Supreme Court decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*.³ Counsel notes the references in the Council's senior heritage advisor's report to his view that the loss of the building would not have a significant adverse effect on the values of the heritage area, which Mr Bennion submits does not address the test in s 95A, which is whether the effect is "more than minor".

[20] The Council's decision not to notify the application is governed by s 95A of the Act, which provides as follows:

Public notification of consent application at consent authority's discretion

- (1) A consent authority may, in its discretion, decide whether to publicly notify an application for a resource consent for an activity.
- (2) Despite subsection (1), a consent authority must publicly notify the application if—
 - (a) it decides (under section 95D) that the activity will have or is likely to have adverse effects on the environment that are more than minor; or
 - (b) the applicant requests public notification of the application; or
 - (c) a rule or national environmental standard requires public notification of the application.

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

- (3) Despite subsections (1) and (2)(a), a consent authority must not publicly notify the application if—
 - (a) a rule or national environmental standard precludes public notification of the application; and
 - (b) subsection (2)(b) does not apply.
- (4) Despite subsection (3), a consent authority may publicly notify an application if it decides that special circumstances exist in relation to the application.

[21] That section was inserted with effect from 1 October 2009 by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

[22] The plaintiff's submissions address the intensity of scrutiny which the Court should apply to a review of a decision not to notify under s 95A. Mr Bennion submits that the plaintiff will argue on the application for review that a higher intensity of review applies to a decision not to notify than to a decision to notify, despite the changes in 2009. The 2009 amendments made substantial changes which affect the applicability of the Supreme Court decision in *Discounts Brands Ltd v Westfield (New Zealand) Ltd*.⁴ The changes made by the new provisions were summarised in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* in these terms:⁵

[39] Four points can be made about the difference between the present s 95A and the provisions under consideration in *Discount Brands*. These are:

- (a) The presumption in favour of notification has been removed, and replaced with a discretion whether to notify an application.
- (b) The word "satisfied" has been replaced by "decides". In *Discount Brands* the Chief Justice had commented that the use of the term "satisfy" could be contrasted with the use of the term "decides" in other sections of the Act, and implied a higher degree of certainty than provisions where the term "decides" was used.
- (c) The consent authority must now "decide" whether the adverse effects "will have or are likely to have" effects that are "more than minor". This contrasts with the provision in issue in *Discount Brands* which required the consent

⁴ *Discounts Brands Ltd v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597.

⁵ *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73 (footnotes omitted).

authority to be “satisfied” that the adverse effects on the environment “will be minor”.

- (d) There is now no express requirement that the consent authority have “adequate information” before making a notification decision. However, as noted above, this requirement was removed in 2003, so was already a feature of the legislative regime before the 2009 amendment.

[40] A consideration of the Parliamentary material relating to the 2009 amendment also confirms that Parliament’s intention was to provide greater certainty to councils in relation to non-notification decisions and to facilitate the processing of resource consents on a non-notified basis.

[23] It is not necessary for me to address in detail the level of intensity required. It is sufficient to observe that Parliament’s intention as described by the Court of Appeal indicates that the plaintiff faces a high hurdle in challenging the Council’s non-notification decision.

[24] The Council officer had before him two reports addressing the heritage value of this building. No further assessment under s 6(f) of the Act is required in making the non-notification decision. The decision in a particular case requires the application of the District Plan provisions which deal with the protection of historic heritage, in this case chapters 21 and 22. The Act envisages the formulation and promulgation of a cascade of planning documents, each intended to ultimately give effect to pt 2, including s 6. A decision under the relevant District Plan provisions is at the bottom of that cascade. The decision maker must apply the relevant provisions, prepared in conformity with s 6(f). Independent reference by the decision maker to s 6(f) is not a mandatory consideration.

[25] There is not a seriously arguable case that the Council planner applied the wrong test under s 95A. The reports on which he relied were directed to the substantive application, and correctly identified the relevant issue for the application as whether the demolition would have a significant adverse effect on the values of the heritage area. It is clear however from the passage I have cited at [15] that Mr O’Leary reached his own view having regard to those reports, and decided that the adverse effects are no more than minor. Mr O’Leary applied the correct legal test in reaching his decision that the application need not be publicly notified. The merits of that decision are not in issue on judicial review.

[26] Even if the plaintiff had established an arguable case that the non-notification decision was affected by a reviewable error, that would not itself give the plaintiff a right to be heard on the substantive application for resource consent. The question of notification would have to be reconsidered and the possibility of the same outcome could not be excluded. Parliament's intention in passing the 2009 Amendment Act must also be borne in mind. That was to facilitate the processing of resource consents on a non-notified basis.⁶ It would be contrary to that intention to permit the planning process to be impeded by preventing the implementation of a planning decision, based on a challenge to the decision that the application need not be publicly notified.

[27] For these reasons I have reached the clear view that there is not a sufficiently arguable case that the Council erred in law in making the non-notification decision to justify the grant of interim relief.

[28] Further, if (contrary to that conclusion) the plaintiff had established an arguable case for a right to be heard on the substantive resource consent application, it would be necessary to consider whether the right to be heard on that application would give the plaintiff such a status that it has a position to protect sufficient to justify interim relief delaying the implementation of the substantive decision. As I have observed at [6], standing to apply for judicial review of that decision does not necessarily give a right to intervene in the implementation of that decision which could be said to constitute a position capable of being protected by an interim order under s 8.

[29] The relief sought is directed to delaying the demolition of the building. The plaintiff has no interest in the building. The concern is with a potential loss of heritage values. On that aspect, the plaintiff has not demonstrated an interest greater than that of the public at large. The plaintiff may be representative of some of the Aro Valley community. That community does not necessarily have, in respect of the possible heritage value of the building, any greater interest than the public at large. The heritage values contended for do not derive from the physical character of the building in its present state. On the evidence, I find no potential loss of physical or

⁶ *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, above n 5.

environmental amenity which might give the Aro Valley community a position, in s 8 terms, greater than that of the wider Wellington community.

[30] I am also satisfied that it is not appropriate, in the exercise of discretion, to grant relief directed to preventing demolition, an outcome which would ultimately be achieved only if the plaintiff was successful on a rehearing of the resource consent application. This interim order application is concerned with what is necessary to protect the position of the plaintiff. The order sought is designed to prohibit the second defendant from proceeding with what it is currently authorised to do; to demolish the building. This application is not directly concerned with what is necessary to protect the building from demolition.

[31] It is appropriate to consider in a very general way the merits of the case which the plaintiff has indicated it would present if it did achieve the right to be heard on the substantive application for resource consent to demolish the building. There are presently two historical assessments, by Mr Bowman and Mr Keppel, which assess the historical heritage value of the building as low. The plaintiff does not advance any evidence which challenges these professional assessments. In essence, its intention, as appears from Mr Sapsford's evidence, in particular his letter to the Council set out at [14], is to challenge the weight to be given to those assessments. There is not, on my assessment of the evidence, any significant risk that demolition will result in a loss of heritage values of such an extent as to justify the intervention of this Court to prevent demolition.

[32] The delay in making this application would also be a relevant consideration on whether to grant relief, if (contrary to my findings) the plaintiff had otherwise established a basis for the grant of relief. The plaintiff was aware of the decision by 9 October 2014 at the latest. This application was not filed until 27 February 2015. In the circumstances of this case, and having regard to the potential effect of the grant of interim relief for the second respondent, I regard that period of delay as weighing heavily against the exercise of the discretion to grant relief.

[33] The application for interim relief is accordingly refused.

[34] The parties did not make submission on costs. I reserve costs. To assist the parties to resolve that issue, and without expressing any concluded view, I indicate my preliminary view that I see nothing to justify a departure from the normal principle in r 14.2(a) of the High Court Rules. I do not, as a preliminary view, consider that the case would fall within r 14.7(e). If the parties are unable to resolve costs in the light of that indication counsel may submit memoranda.

“A D MacKenzie J”