IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2004-470-737

BETWEEN	BELLA VISTA RESORT LIMITED First Plaintiff
AND	BELLA VISTA PROPERTIES LIMITED Second Plaintiff
AND	WESTERN BAY OF PLENTY DISTRICT COUNCIL Defendant
AND	CONNELL WAGNER LIMITED Third Party
AND	EVELYN MARIE HOFMANN Fourth Party

Hearing: 23 August 2005

Appearances: P Mabey QC and G Dixon for Plaintiffs
P J Crombie for Defendant

Judgment: 23 August 2005

JUDGMENT OF SIMON FRANCE J

Solicitors:
Mr P Mabey QC, Barrister, PO Box 13199, Tauranga
Cooney Lees Morgan, Solicitors, PO Box 143, Tauranga

Introduction

[1] This is an application by the defendant Council to strike out a claim of negligence brought against it. The claim relates to two resource consent decisions the Council made. The strike out is advanced on the basis that no duty of care could be owed to either of the plaintiffs.

The parties

[2] Mrs Hofmann was the applicant for the resource consents which were issued by the defendant. She has been joined as fourth party. Mrs Hofmann took no role on the strike out application.

[3] Connell Wagner Limited presented the application for resource consent on behalf of Mrs Hofmann. It has been joined as third party. It took no role on the strike out application.

[4] The Western Bay of Plenty District Council issued a resource consent, on a non-notified basis, that allowed Mrs Hofmann and her husband to commence operating a lodge and function centre from their property. The Council also issued a variation which allowed the Hofmanns to build a new function centre on the property. This was also done on a non-notified basis. Both consents were later quashed by the High Court on review.

[5] Bella Vista Properties Limited, the second plaintiff, bought the property and business off Mr and Mrs Hofmann on 28 August 2002. This was approximately eight months after the Council had granted the variation. The pleadings imply the function centre was built by this time.

[6] Bella Vista Resort Limited, the first plaintiff, leased the business from the second plaintiff in April 2003. It was operating the business at the time the Council, in accordance with the High Court decision, ordered the business to cease. Neither the first nor second plaintiff made a new application for resource consent to run the business.

[7] Mr and Mrs Hofmann are the sole directors, and shareholders, of the first and second plaintiffs.

Facts (as alleged by plaintiffs)

[8] Evelyn Hofmann and her husband owned a 3.8 hectare property near Tauranga. Mrs Hofmann applied to the Council for a resource consent to operate "an exclusive lodge catering for a small number of guests". It was intended to be able to accommodate up to 12 people overnight. It was anticipated in the application that there would also be an occasional wedding or corporate function for up to 150 guests. The application was presented on their behalf by the third party to these proceedings.

[9] Their application included written consents from five neighbours who it was said were potentially affected. The application contended that the consent could be granted on a non-notified basis, setting out various reasons including fulfilment of the requirement that all potentially affected persons consent.

[10] On 29 August 2001 the Council granted the application on a non-notified basis. The approval allowed 50 large-scale events, which individually could not exceed 150 people per function, and collectively could not exceed 80 people per event calculated over a calendar year. On a daily basis the non large-scale events could not exceed 50 people per day, nor average more than 15 people per day averaged over a calendar month.

[11] The Hofmanns commenced the business on 5 September 2001.

[12] In October 2001 Mrs Hofmann sought advice from the Council concerning the adding of a further building. The intention was to build a new function facility. Mrs Hofmann was advised that she would not require new consents from the affected persons, that a written application was required (appropriate wording was apparently suggested by the Council), and that it could proceed on a non-notified basis. An application was made by means of a letter written by Mrs Hofmann, to

which was attached two site maps and a proposed floor plan. Consents from affected neighbours were not provided.

[13] A Council official approved the application. The provision under which consent was given was that the application involved a "change or cancellation of a consent condition". Such a variation was permitted if there had been "a change in circumstances that had caused the condition to become inappropriate or unnecessary".

[14] The Hofmanns thereupon built the function centre.

[15] By decision dated 18 February 2004 the High Court revoked both the consent and the variation. The Council thereupon required the plaintiffs to cease all activity by 7 April 2004, and this occurred.

The judicial review decision

[16] The alleged negligence of the Council relates to how it made the two decisions that the High Court found to be flawed. These were the decision to grant the initial consent on a non-notified basis, and the decision to treat the variation application as an application to vary an existing condition of the consent, such variation having been brought about by a change in circumstances.

[17] The judicial review proceedings were brought by the neighbours who had signed the written consents that were presented as part of the original application. The judicial review proceedings are captured in this passage from Keane J's ruling:

> [2] Their essential complaint is that the Council, in its two decisions, authorised a form of activity, and on a scale, that could not begin to be reconciled with their consents, and that on each application it should have given them an opportunity to be heard. Its decision to take their consents at, as they say, more than face value, denied them standing, they complain, either to challenge the Council's decisions or to appeal them. Hence this application.

[18] The claim, that was upheld, was that the neighbours' written consents related to an "exclusive homestay and restaurant", whereas the resource consent that was

given related to a fully fledged conference centre which was at odds with the rural setting.

[19] In the course of his decision Keane J observed:

> But if the consent [of the neighbours] is not plain, and what is applied for is not explicitly identified and agreed to in the consent, a consent authority has, I consider, a duty to satisfy itself just what is consented to and what is not.

[20] The variation allowing the new building was granted under s 127(1) of the Resource Management Act. That section allowed for a variation so long as all that was involved was a change or cancellation of a consent condition, which because of a change in circumstances had become inappropriate or unnecessary. Keane J held that an application to erect a new building, made just two months after the original consent, could not fall within the section.

[21] The resource consent and variation were quashed.

Causes of action

[22] The statement of claim, after reciting this factual background, asserts that the defendant owed a duty of care "to all persons, natural or corporate, who relied upon either the consent or the variation or both".

[23] Clauses 17 - 19 of the statement of claim allege:

> 17. Pursuant to its said duty the first defendant was required to ensure that the applications for consent and variation were dealt with in accordance with the Act and validly issued under the Act.
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> 18. The first defendant is in breach of its duty to the first and second plaintiffs, who have relied upon *the consent*, in the following particulars:-
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> (a) Failing to properly consider the application for consent in comparison to, and in conjunction with, the affected persons' written consents.
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> (b) Failing to properly apply the provisions of Section 94 of the Act in determining that the application could proceed as non-notified.

(c) Issuing a consent for activities beyond what was consented to by the affected persons and applied for by Evelyn Hofmann.

(d) Issuing a clearly invalid consent.

19. The first defendant is in breach of its duty to the first and second plaintiffs in approving *the variation* on a non-notified basis in the following particulars:-

(a) Failing to properly apply the provisions of Section 127 of the Act.

(b) Wrongly determining that the variation involved only a change or cancellation of a condition to the original consent.

(c) Granting the variation on a non-notified basis in reliance upon the affected persons' original consents.

(d) Issuing an invalid variation to the original consent.

Overview of competing submissions

[24] Mr Crombie submitted that there was no authority supporting the proposition that, under the Resource Management Act 1991, a local authority owed a duty of care to all persons to ensure consent applications were processed and issued in accordance with the Act. He submitted such a duty was contrary to the statutory scheme. Cases where a duty had been recognised were determined under a different scheme – the Town and Country Planning Act – and involved relationships that had a plainly greater degree of proximity. Imposing a duty of care in the circumstances of the present case would be casting the net too widely. The consent was not issued for the purposes of protecting the plaintiffs' economic interests, and the plaintiffs could not rely on it for that purpose.

[25] Mr Mabey QC submitted that the consents that the Council issued were in relation to the operation of a business. The resource consent application had been made for economic reasons and the plaintiffs' reliance on it was consistent with this. Mr Mabey pointed to cases where, in the resource consent context, a duty of care on a Council had been imposed. It was not, in his submission, possible to say on a strike out that the claim was so untenable it should not be allowed to proceed.

Discussion

(a) *Applicable principles*

[26] The authorities concerning the process to be followed when a new duty of care is alleged are well known. The two leading domestic authorities are *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 and *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324. It seems to me that whichever passage is cited from whichever judgment, the general principle does not change. There is in New Zealand a two-step process that involves an initial proximity inquiry, and then a broader inquiry into the wider policy implications. There is no bright-line between these two inquiries. There are a wide range of factors relevant to the inquiry, and no absolute allocation of which factor to which inquiry is possible, necessary, or desirable. Above all, it is very much a case specific exercise from which I infer that the Court initially determining the issue is to avoid overly broad characterisations of the new duty, should one be recognised as a tenable proposition, and overly broad rejections of the duty, should the particular case be recognised as untenable.

[27] Against this background I cite only one passage from the authorities, recognising that others could be cited and that any such passage will represent the same general principles but will bring its own nuances. In *South Pacific* Richardson J (at 305-306) observed:

> The ultimate question is whether in the light of all the circumstances of the case it is just and reasonable that a duty of care of broad scope is incumbent on the defendant (*Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1985] AC 210, 241 per Lord Keith of Kinkel). It is an intensely pragmatic question requiring most careful analysis. It has fallen for consideration in numerous cases in this Court over recent years and, drawing on *Anns v Merton London Borough Council*, we have found it helpful to focus on two broad fields of inquiry. The first is the degree of proximity or relationship between the alleged wrongdoer and the person who has suffered damage. That is not of course a simple question of foreseeability as between parties. It involves consideration of the degree of analogy with cases in which duties are already established and, as I shall develop shortly, reflects an assessment of the competing moral claims. The second is whether there are other policy considerations which tend to negative or restrict – or strengthen the existence of – a duty in that class of case.

[28] I analyse the present case under two initial headings which reflect the approach of Heath J in *Hobson v Attorney-General* CIV 2003-404-6960, 23 September 2004. The first is to consider the pleaded duty against the statutory scheme in order to assess whether the scheme excludes it. The second is to focus more directly on proximity issues between the parties as they arise on the particular facts. It is convenient to preface that exercise by two observations:

a) the plaintiffs were not the resource consent applicants. They are subsequent purchasers of the property and lessee of the business to which the consent decisions relate;

b) the duty of care pleaded is very broad and perhaps reflects a recognition that it needs to be that broad to overcome proximity difficulties. The duty pleaded is that:

> The first defendant in issuing the consent and variation owed a duty of care to all persons, natural or corporate, who relied upon either or both of them.

(b) *The statutory scheme*

[29] There would be little to be gained from an extensive overview of the provisions of the Resource Management Act 1991. It is a comprehensive statute which has as its primary purpose the sustainable management of natural and physical resources. Sustainable management means managing the use, development and protection of natural and physical resources in a way that balances protection of the environment and resources with enabling communities to provide for their health and safety, and their social, economic and cultural well-being. Expressed in these abstract terms, as s 5 of the Act does, it is a complex task. It is a task that very much imposes a public function on those charged with bringing the appropriate balance into effect.

[30] Resource consents are dealt with in Part 6 of the Act. Section 104 states the matters a resource consent must have regard to. They include:

a) any actual or potential effects on the environment;

b) any relevant provisions of a national policy statement, a New Zealand coastal policy statement; a regional or proposed regional policy statement, a plan or a proposed plan.

[31] The mandatory considerations in s 104 are themselves subject to Part 2 of the Act which addresses matters of national importance (seven are listed), "other matters" (eleven are listed), and the principles of the Treaty of Waitangi. In 1991 AP Randerson (as he then was) wrote an early piece on discretionary powers given under the Act. His conclusion provides a helpful summary of the focus of the task facing consent authorities (*Discretionary Powers under Resource Management Act 1991*, [1991] NZ Recent Law Review, 464, 465):

> The key themes of the Act which will guide the exercise of discretion are the principle of sustainable management, the control of environmental effects, and the integrated management of resources. The Act is intended to liberalize the strict planning regimes of the past while at the same time ensuring high standards of environment protection are maintained. These objectives contain inherent potential for conflict which will call for sophisticated decision-making by those having responsibilities under the Act.

[32] In my view it is not necessary to analyse the Act further in order to reach the clear view that there is nothing in the statutory scheme to suggest it was intended to impose a duty of care on a consent authority "to all persons, natural and corporate" who might rely on or be affected by the consent. The range and nature of considerations to be taken into account, and the range of people who might rely on them or be affected by them, is plainly very wide.

[33] The present pleadings limit the claim to "reliance" rather than to those "affected". Even so, the present facts provide an indication of who might "rely". The application was for a lodge and function centre – one immediately can identify guests, businesses who supply the consent holders, and employees. All would fall within the duty pleaded. The focus of the Act in the area of resource consent is on the assessment of the impact of the activity on the environment. It is quite some distance from a consideration of the economic interests of persons who have a connection to the activity.

[34] It is important to emphasise that my observations do not represent a statement that the consent authority might never owe a duty of care in negligence stemming from its resource consent functions. Rather, it is a statement that, in my view, recognition of a private cause of action of the width alleged here is inconsistent with the scheme of the Act. It is inconsistent with the statutory duty imposed on a consent authority to discharge a public function which has as its focus the promotion of sustainable use of resources, and which entails the consideration of a very wide range of factors.

(c) *Proximity*

[35] A key feature of this case is that the plaintiffs were not involved in the resource consent process. Indeed, neither plaintiff existed at the time the decisions were made. They are third parties, subsequent purchasers of a business and a property in relation to which there was an existing resource consent.

[36] In *Attorney-General v Carter* [2003] 2 NZLR 160 the plaintiff was a ship owner who sued the Ministry of Transport in relation to what it said was the negligent issuing of a survey certificate for the vessel. The plaintiffs were directors of a company that at the time of the survey was negotiating to buy the ship. Ultimately the plaintiffs bought the ship on their own behalf. The claim was struck out, and this was upheld on appeal.

[37] The judgment of the Court was delivered by Tipping J who held that the proceedings failed for lack of proximity. His Honour analysed the purposes of the relevant Act. The mismatch between the purpose for which the certificate was issued – namely safety – and the purpose for which the plaintiffs were relying on it – namely their economic interests – was fatal to the claim.

[38] Mr Cox submitted the same analysis was applicable here. Because I accept the submission, it is helpful to set out the relevant two paragraphs from Tipping J's judgment (at p 166):

> [15] From these provisions it can readily be seen that the survey requirement was and is focused on matters of safety and seaworthiness of

> ships. We cannot accept Mr Hooker's attempt to suggest a difference between the concepts of safety and seaworthiness. The latter obviously has, in context, a safety connotation. The purpose of the survey requirement is underlined by the passages we have emphasised in the citations from the legislation made above. It is also apparent from the general scheme of this part of the legislation.
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> [16] Further support for the proposition that safety is the purpose of the statutory survey regime comes from the kinds of uses to which a ship may be put so as to justify an exemption from survey under s 204. The uses set out in that section all have as their linking thread the reduction or absence of risk to the vessel from the perils of the sea. Mr Hooker placed some reliance on s 206 and the expression "in all respects satisfactory for the service for which the ship is intended to be used". We regard it, however, as obvious from the context that Parliament meant that the ship had to be satisfactory from the safety point of view. There is nothing in the legislative scheme, or in the individual sections, suggesting that survey certificates were intended to be issued or relied on for economic purposes.

[39] The analysis previously undertaken of the Resource Management Act scheme need not be repeated. The focus of the Act is the effective management and protection of resources and the environment. The plaintiffs had no connection to that process. As noted, they did not exist at the time of the decisions. Rather, they rely on the consent solely for the purpose of their economic interests. In my view the analysis is the same as in *Carter*.

[40] Mr Mabey submits that the consent was about the business, and this distinguishes it from *Carter*. However, the survey in *Carter* was as to seaworthiness for the purpose for which the ship was used and so is closer on the facts than might be thought. More importantly, the present consent is not truly about the business. Rather it is about controlling the impact of the business on the environment.

[41] There have been cases where a duty of care on a Council exercising resource consent functions has been recognised. I do not consider any of them support the imposition of a duty of care in favour of persons in the position of the plaintiffs. In *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA) the plaintiff was an affected neighbour. The Council, contrary to assurances given to the plaintiff, authorised the building of a house on an adjoining property in a spot which meant his views to the ocean were affected. The approval was alleged to be negligently given. The relationship of the plaintiff was therefore both as an existing neighbour and as one who had made specific inquiries and been given specific assurances.

[42] In *Port Underwood Forests Ltd v Marlborough County Council* [1982] 1 NZLR 343 the plaintiff was the consent applicant. It sought, and obtained, permission to establish a commercial forest. A condition was that it plant a buffer strip of decorative plantings; it planted exotic rather than indigenous trees and this led to objections. It transpired that the proper consent process had deliberately not been complied with. This was not at the initiative of the plaintiff, but was a decision of the Council's to by-pass the correct procedures pursuant to a policy to encourage this type of activity. It is to be noted that a duty of care was conceded without argument.

[43] The facts of *Port Underwood Forest* raise a matter in the present case on which I should comment. The analysis I have undertaken treats the plaintiffs as subsequent arms length purchasers. The reality, of course, is that they are closely connected to the resource consent applicants, but I saw no reason to go behind the corporate veil. If one did so, then the actions of the applicants would have come into focus. At that point I would have been very reluctant to conceive of a duty of care on the particular facts when the negligence was in failing to discern that the applicants' own consents were misleading. The concerns expressed in *Three Meade Street Ltd v Rotorua District Council* [2003] 1 NZLR 504 would have been very much to the fore. There it was held a builder could not sue for negligent inspection when the failure was to not discover the builder's own inadequate work. I observe, however, that this concern would not extend to the consent variation, only the original application.

[44] Returning to like cases, in *Gregory v Rangitikei District Council* [1995] 2 NZL 208, the plaintiff was an unsuccessful tenderer for a property. The procedure followed in that case was complex and need not be described here. It is sufficient to observe that the plaintiff had a long connection with, and a known interest in, the land, had been the highest bidder yet was overlooked when, in con-compliance with the requirements of the Local Government Act 1974, the Council entered into private negotiations with another party.

[45] Finally, in *Bronlund v The Thames Coromandel District Council* (CP 48/94, Hamilton, 2 April 1998) the plaintiffs were the consent applicants. They obtained a

building consent but had to cease work when it was discovered the approved building site was contrary to the relevant Plan. The error was sourced in the negligent maintaining of the relevant records contrary to an express statutory duty.

[46] In my view, none of these cases suggest that the Council might owe a duty in the present case to the plaintiffs. All the plaintiffs in those cases had a much closer and more obvious connection to the consent process than exists here.

Conclusion

[47] The plaintiffs' claim is struck out on the basis that there is no tenable case that, on these facts, a duty of care could be owed to them by the Council.

[48] Counsel were agreed that the proceedings should be accorded a category 3 status, and that costs should follow the event. I consider on reflection that a category 3B award is more appropriate than the suggested category 3C. Accordingly, costs are awarded to the applicant/defendant on a 3B basis, together with reasonable disbursements to be fixed by the Registrar if necessary.

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Simon France J