IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2012-485-1503
[2013] NZHC 2654

BETWEEN		PALMERSTON NORTH CITY COUNCIL Applicant
AND		NEW ZEALAND WINDFARMS LIMITED Respondent

Hearing: 10 October 2013

Counsel: J W Maassen and N Jessen for Applicant
J B M Smith QC and A D Luck for Respondent

Judgment: 11 October 2013

JUDGMENT OF WILLIAMS J

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[1] The respondent Council seeks leave to appeal my judgment of 20 June 2013 to the Court of Appeal.

[2] Three straightforward questions are posed as follows:

(a) *Does condition 1 of the Te Rere Hau resource consent apply to either or both of (i) and (ii) below:*

(i) *The noise generating characteristics and performance of the turbines installed at the Te Rere Hau windfarm. Specifically, the turbines' sound power level and the special audibility of the sound they generate;*

(ii) *The noise effects at receiver locations based on the assessment of the scale character and intensity of those effects in the*

application for the Te Rere Hau windfarm including noise contours?

(b) *Is it lawful for the High Court (rather than the Environment Court) to decide whether or not the Te Rere Hau windfarm has been constructed, operated or maintained in a manner that complies with condition 1?*

(c) *If the answer to question (a) is 'no' in both cases and the answer to question (b) is 'yes' then was Williams J right as to the scope of the application for the Te Rere Hau windfarm?*

[3] The law is clear that the threshold to be met in allowing a second appeal is high. Section 144 of the Summary Proceedings Act 1957 provides that the court "may grant leave if in the opinion of that court the question of law involved in the appeal is one which, by reason of its general or public importance, or for any other reason, ought to be submitted to the Court of Appeal for decision".

[4] The general principle is that a first appeal will produce a final result unless there is a very good reason related to the general or public importance of the question of law raised or for some other reason a second appeal is warranted. The decision of Wild J in *Genesis Power Limited v Manawatu-Wanganui Regional Council & Ors*[1] is often cited as a useful synthesis in the RMA context of the relevant considerations. They are as follows:

(a) The applicant must show good cause why leave should be granted.

(b) The application must raise a seriously arguable question of law.

(c) If the court has difficulty in identifying a clear and relevant question of law, leave to appeal should be declined.

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1 *Genesis Power Limited v Manawatu-Wanganui Regional Council & Ors* [1997] 1 NZLR 211 at 215.

(d) It is necessary to consider dispassionately whether the disputed matter contains the requisite element of sufficient importance. The scarce time and resources of both the High Court and Court of Appeal are not to be wasted. The Court of Appeal is not engaged in the general correction of error. Its primary function is to clarify the law and determine whether it has been properly construed and applied by the court below. Not every alleged error of law is of such importance as to justify further pursuit of litigation which has already been considered and ruled upon by a court.

(e) It is not sufficient that issues as a whole are of general public importance or interest. It is the question identified as the matter for appeal which must be a matter of general or public interest.

(f) Questions or issues of law which are fact specific or limited the particular facts and findings of the case at hand are not generally matters of general and public importance.

[5] As Priestley J said in *Dome Valley District Residence Society v Rodney District Council*:[2]

> Of particular relevance is the policy of the legislation which does not provide an automatic second appeal right. Finality of litigation is a desirable outcome except in those few cases where a legal issue can be identified which transcends mere partisan interests of the parties.

[6] I am satisfied that the questions as posed raise seriously arguable questions of law. The answer I gave in the substantive appeal turned on an interpretation of the consent in its context. I readily accept that there are other approaches to the interpretation of the document that are at least capable of serious argument, and more likely to favour the position taken by the respondent Council.

[7] Are these questions of sufficient general or public importance in accordance with the first arm of the test in s 144? New Zealand Windfarms Limited (NZWL)

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[2] *Dome Valley District Residence Society v Rodney District Council* HC Auckland CIV 2008-404-0587, 8 December 2008.

argued that they are not. Mr Smith QC submitted that the substantive decision focused on the detail of the Assessment of Environmental Effects (including the Noise Impact Assessment Report) and the treatment of those documents by the consenting Commissioner. Mr Smith argued that there was no significance in the issues raised in this appeal beyond the documentation in this particular application.

[8] Mr Maassen for the applicant said the impact of the decision was much wider than that. He argued that at the very least, all windfarms confront the same issues and must apply the same acoustic assessment formula in national standard NZS6808. In such cases, he said, the relationship between noise generated at source and noise levels at the receiving environment inevitably arise for assessment by regulatory authorities. The issue confronted here, he argued, will arise at least in every windfarm, and perhaps more widely still, in every application by a significant noise generator.

[9] Mr Maassen pointed to the extensive submissions made by Mr Smith in the substantive appeal before me[3] in which he (Mr Smith) emphasised the significant potential impact of this appeal on the interests of other windfarms operating in the country. This submission demonstrated that even the plaintiff accepted that the issues raised were of wider significance.

[10] I would conclude on this leg of s 144 that the balance is with Mr Maassen. I cannot be certain that any answer provided to the questions as posed will impact on the operation of other windfarms in the country, but it does seem to me given that there is a single standard to which regulatory authorities resort, and that common issues consistently arise in windfarm applications, albeit in unique factual circumstances, that it must be very likely indeed that Mr Smith was right in his argument before me in the substantive appeal that these questions are of wider importance.

[11] Even if I am wrong on that conclusion, the second leg of s 144 applies in my view. Leave may be granted if the question of the law should be posed to the Court of Appeal "for any other reason". Here, the interests of the local community in the

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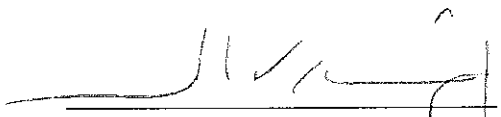
3 See [209]–[232] of the appellant's written synopsis dated 26 November 2012.

receiving environment are important. Both counsel acknowledged that there have been a large number of complaints made, although Mr Smith rightly pointed out that most of them have been generated by a small number of people.

[12] This is a case similar in kind to that confronting Casey J in *Centrepoint Community Growth Trust v Takapuna City Council*[4]. In that case, one matter that weighed with the Judge was that the Centrepoint Community (numbering by virtue of the planning consent sought, up to 300) had a great deal invested in being able to expand their community and this was therefore of importance to them. The fact that the Court of Appeal was the end of the road for that community clearly weighed with the learned Judge. In my view, the effect of the NZWL windfarm on the acoustic amenity of its surrounding community is of genuine importance to that community. That can be a factor in granting leave, all other things being equal – including arguability.

[13] Mr Smith argued that this was not the end of the road for the respondent Council in this case because (as I said in the judgment) s 128 RMA is available. I agree that is a distinction, but not a material one. The crucial conclusion in *Centrepoint* is that the importance of a matter to a particular community can be a qualifying attribute under the second leg of s 144.

[14] Leave to appeal is therefore granted, and the questions are as posed above.



Williams J

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4 *Centrepoint Community Growth Trust v Takapuna City Council* HC Wellington M596/83, 22 August 1984. I am grateful to Mr Smith for responsibly bringing this decision to my attention.