Dye v Auckland Regional Council

Court of Appeal Wellington CA 86/01
26 July; 11 September 2001
Gault, Keith and Tipping JJ

Resource management – Resource consents – Subdivision development into "lifestyle blocks" – Non-complying activity – Objectives and policies of district plan – Whether consideration of cumulative effects ought to be limited to those due solely to rural character – Whether application gave rise to precedent effects – Meaning of "effect" – Precedent and cumulative effects – Role of High Court on appeal from Environment Court – Resource Management Act 1991, ss 104(1), 105(1)(c), 105(2A)(a) and (b).

The appellants wished to pursue a subdivision development whereby their land would be divided into five lots of various sizes. The land was zoned rural and the development was non-complying so the appellants applied to the district council for a resource consent. The council refused to grant consent, the application being opposed by the respondent regional council. The owners successfully appealed to the Environment Court but the regional council successfully appealed to the High Court on questions of law. As the application was non-complying the owners had to pass through one of the gateways referred to in s 105(2A)(a) and (b) of the Resource Management Act 1991. Then, if a gateway was satisfied the owners had to satisfy the consent authority that the application ought to be granted having regard to the matters set out in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c). The Environment Court had found that the proposal satisfied both gateways. The High Court found that the Environment Court had erred on key questions of law. The owners appealed to the Court of Appeal on three points of law: whether the High Court had misinterpreted the objectives and policies of the relevant district plan, this being gateway (b) in s 105(2A); whether consideration of cumulative effects ought to be limited to those due solely to rural character; and whether the application gave rise to precedent effects under s 104.

Held: 1 Rather than considering whether the decision of the Environment Court had been one open to it at law the High Court had reached an independent assessment. The High Court had not interpreted the objectives and policies and then identified the manner in which they had been misinterpreted or misunderstood. Instead the High Court had worked backwards, reasoning that the proposal was not consistent with the objectives and policies as the Court saw them, and thus that the Environment Court must have misunderstood them. It was not for the High Court to differ on whether the proposal was contrary to the objectives and policies as the appeal was limited to the questions of law. Either the Judge had substituted his own assessment of the weight to be applied

to various factors or had found an error of law different from that which he said formed the basis of his conclusion. There was no impediment at law which prevented the Environment Court from holding that the proposal was not contrary to the objectives and policies of the plan. That Court had not been influenced in any improper way or been selective in the reading of documents. It was fully mindful of the basic thrust of the relevant objectives and policies. The application was thus not wrongly assessed under s 104(1)(a) and s 105(2A)(b) (see paras [13], [16], [20], [21], [22], [25]).

Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323 referred to.

2 The Environment Court had been entitled to conclude that no precedent would be set by granting the application. In setting out the factors that it regarded as relevant to that conclusion the Court had not established a checklist that if met, would require an authority to grant an application in a subsequent case. The High Court should have been concerned with matters of law only, but had moved to consider matters of fact and had reached its own assessment as to whether the granting of consent would have a precedent effect (see paras [33], [34], [35]).

3 In s 104(1)(a) Parliament had implicitly abandoned the definition of "effect" set out in s 3 which only applied unless the context otherwise required. Had Parliament wished the s 3 definition to apply it would not have used the phrase "any actual or potential effects". Section 104(1)(a) was concerned with the impact of a particular activity on the environment, not with the effect which the application might have on the fate of subsequent applications for resource consents. Precedent effects ought to be considered under s 104(1)(d) which was similar in concept to gateway (b) in s 105(2A) or alternatively under para (i) of s 104(1) (see paras [41], [42]).

4 In order to reach its conclusion the High Court must have found that it was a mandatory requirement to make an area-wide assessment with input from all relevant areas of expertise. This was wrong. The correct approach to the concept of effects did not require such an approach as compliance with the resource management process was already complicated and expensive enough. Precedent effects were a relevant factor which a consent authority should take into account when considering an application for a non-complying activity. Cumulative effects should also be taken into account but without the obligation for an area-wide investigation. Therefore the High Court was not correct in its finding that the Environment Court had erred in failing to consider "all of the cumulative effects of the proposed subdivision". Nor was it correct in finding that the Environment Court erred in finding that the application would not give rise to "precedent effects under s 104" (see paras [45], [49]).

Appeal allowed.

Other case mentioned in judgment

Wellington Regional Council (Bulkwater) v Wellington Regional Council (Environment Court, Wellington, W 3/98, 7 January 1998, Judge Treadwell).

Appeal

This was an appeal by Russell Dye, an applicant for resource consent, to the Court of Appeal on three questions of law from the judgment of Chambers J (reported at [2001] NZRMA 49) allowing an appeal from the

Environment Court's decision (Auckland, A 22/00, 6 March 2000, Judge Whiting) to overturn the decision of the Rodney District Council (the RDC), the second respondent, to refuse Mr Dye's application for resource consent for a non-complying subdivision development, an application opposed by the Auckland Regional Council (the ARC), the first respondent.

R B Brabant and *M J E Williams* for Mr Dye.
B I J Cowper and *J A Burns* for the ARC.
W S Loutit and *A J Bull* for the RDC.

The judgment of the Court was delivered by

TIPPING J. [1] This appeal from the judgment of Chambers J (reported at [2001] NZRMA 49) in resource management proceedings concerns three questions of law, in respect of which the Judge gave leave to appeal to this Court. We will describe the history of the case only to the extent necessary to put the legal questions in sufficient context.

[2] The appellant, Mr Dye, owns with his wife a property comprising 16.48 ha at 94 Pomana Road, Kumeu. The locality was described by the Environment Court (Auckland, A 22/00, 6 March 2000, Judge Whiting) at para [5] as having:

> ". . . the characteristics of a peri-urban zone in transition from an earlier generation of town supply dairy farms, small orchards and vineyards to the present relatively small blocks occupied by an increasing number of large, modern houses on properties used for low-intensity agriculture, stud farming, some remnant horticulture and casual 'hobby' grazing."

[3] Within 400 m of the site are two quite substantial restaurants, one catering for up to 100 people and the other for up to 60 people. Each has substantial offstreet parking facilities. Other properties in the vicinity on Pomana Road were described as comprising a range of older and newer dwellings on small "lifestyle" sections, generally from 2 ha to 4 ha, with the largest being a little under 7 ha.

[4] Mr Dye applied to the second respondent, the Rodney District Council (the RDC), to subdivide the land into five lots ranging in size from 1.4 ha to 6.4 ha with an access lot of 0.57 ha. The 6.4 ha lot was identified as being suitable for horticultural use. The land is zoned rural in the operative plan and similarly in what was then a proposed change, now operative, known as change 55. In both cases the subdivision was a non-complying activity. The RDC declined to grant a resource consent, Mr Dye's application having been opposed by the first respondent, the Auckland Regional Council (the ARC). On Mr Dye's appeal to the Environment Court the ARC also appeared in opposition. When the Environment Court granted consent, the ARC appealed to the High Court on questions of law. Its appeal was allowed by Chambers J and Mr Dye then obtained leave to appeal to this Court on the three questions of law to which we will refer a little later.

[5] As Mr Dye's application was for consent to a non-complying activity, it had to pass through one or other of the gateways referred to in paras (a) and (b) of s 105(2A) of the Resource Management Act 1991 (the Act). If neither gateway was satisfied the application would fail. If the application passed through either gateway Mr Dye then had to satisfy the consent authority that the application should be granted, bearing in mind the matters referred to in s 104(1) and in terms of the overall discretion inherent in s 105(1)(c) of the Act. These matters are more fully discussed in the case of

Arrigato Investments Ltd v Auckland Regional Council [2002] 1 NZLR 323, which was heard immediately before the present appeal and in which judgment is being given contemporaneously. The two cases involved a partial overlap of issues and were argued by the same counsel. The Environment Court found that the Dyes' development would be in keeping with the existing environment in Pomana Road. The Court further held, on unchallenged evidence, that because of slope and soil type, continued stock grazing would have adverse effects on the property.

[6] The RDC, supported by the ARC, had contended that the adverse effects of the proposal would be: loss of rural character; loss of amenity; and removal of most of the land from present production. The Court found that the particular neighbourhood was already one characterised by rural residential lifestyle use and, as earlier noted, already contained two restaurants in the close vicinity of the subject land. In view of these various factors the Court found that the development would not adversely affect rural character or amenity values. With regard to loss of present production, the Court found that the land in question had relatively little productive potential and also that retiring the poorer parts of the land into areas of regenerating native bush would enhance environmental values. In the light of these views the Court held that the proposal satisfied gateway (a) in s 105(2A) in that any adverse effects on the environment would be minor; indeed the Court was of the view that no adverse effects would ensue. This conclusion was also relevant and helpful to the Dyes in relation to s 104(1)(a) which requires that when considering an application, the consent authority have regard to any actual and potential effects on the environment of allowing the activity concerned.

[7] In spite of finding that the proposal satisfied gateway (a), the Environment Court considered gateway (b) on a precautionary basis lest it be wrong in relation to gateway (a). The Court held that the proposed development was not contrary to the objectives and policies of the RDC's plan. Chambers J found that the Court had misinterpreted or misunderstood those objectives and policies and had thus erred in law. The first question on the appeal to this Court is whether the Judge himself erred in law in coming to that conclusion.

Question one: objectives and policies

[8] The formal question on which leave to appeal was given is in these terms:

> (a) Was the High Court correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the District Plan in the overall context of Part II of the Resource Management Act 1991 and the statutory documents formulated under the Resource Management Act with the consequence that Mr Dye's application was wrongly assessed under ss 104(1) and 105(2A)(b)?

[9] The Environment Court set out the relevant provisions of the plan in its decision at para [49]. The general objective of the general rural activity area in which the land lies is:

> ". . . to ensure the long term protection and enhancement of the soil, water, air, natural features, indigenous fauna and general rural character of the area, while maintaining flexibility to accommodate future rural land use options and a level of amenity which enables rural production to be effectively and efficiently undertaken. This objective complements the objectives of the Plan in relation to metropolitan Auckland and the urban

areas and settlements within the District together with the opportunities for countryside living and lifestyle activities."

[10] Of further relevance is the provision at para [50] which limits subdivisions to those which:

"(i) Will facilitate primary production . . .

. . .

(iii) Will provide a limited pool of rural-residential sites which, while available on the market generally, will enable those with a need or wish to live in a particular locality, such as rural workers or retiring farmers, to find sites locally . . .

(iv) Will provide for the legal preservation of areas of good native bush or other significant natural features.

. . .

[11] There are two relevant policies described as policy 2 and policy 4. Policy 2 provides at para [48]:

"Maintain and enhance the overall character and productive capacities of the main rural production area. Land, soil, mineral and water resources will be managed so that they remain available for a wide range of rural production activities (including mineral extraction) now and in the future. The number, diversity of size, and location of sites is considered to be generally adequate for existing and foreseeable productive needs as well as contributing significantly to the character of much of the rural area. Consequently the opportunities for further rural subdivision are limited to the following instances:

(a) Some dispersed countryside living;
(b) Indigenous bush and natural feature protection;
(c) Household units on Maori land associated with a Marae;
(d) Horse training sites in the Boord Crescent area;
(e) Boundary relocations;
(f) Various 'one-off' activities permitted or with resource consent;
(g) The creation of sites in excess of 120 hectares.

It is recognised that there will be from time to time intensive productive activity proposals which are reliant upon special climatic or physical conditions which are not found on existing sites of an appropriate size. Applications for non-complying activity resource consent will in part be assessed against the tests that any subdivided site is used for the purpose specified, and that consent would not result in loss of existing rural character or significant adverse effects on the sustainability of primary production potential, either singly, or cumulatively with other applications that could be expected in the vicinity."

And policy 4:

"Facilitate countryside living opportunities focused on specified areas where pressures on rural production activities (including mineral extraction) are or can be limited, and a rural character is maintained. The extension or intensification of countryside living areas shall:

(a) Avoid use of land of moderate to high value for primary production, (as defined by the New Zealand Land Resource Inventory worksheets) so far as practicable;
(b) Not result in significant adverse effects on regionally or locally significant landscape, heritage values, or biological and ecological resources;
(c) Protect the operational needs of rural production activities (including mineral extraction) from lifestyle amenity expectations;
(d) Not limit the likely land needs for growth of urban centres or settlements;
(e) Not adversely affect the safe and efficient operation of existing and future infrastructure;
(f) Not require reticulated wastewater and effluent treatment and disposal services;
(g) Avoid or mitigate any increase in immediate and downstream flooding effects;
(h) Avoid adverse traffic impacts on local roads and State Highways; and
(i) Have regard to the advantages of efficient use of physical resources such as sealed roads, schools and commercial services;
(j) Avoid use of land that is incompatible with existing rural production activities."

[12] Change 55 makes specific provision for rural residential development in what is called the countryside living 2 (town) activity area, the general objective of which is, in relevant part, at para [54]:

> "Provision is made in such a way that adverse impacts on natural resources and rural character are minimised, undue pressure to upgrade the rural roading network or provide reticulated water supply or stormwater or sewage disposal services is avoided, and the future expansion of existing urban settlements is not prejudiced. By concentrating lifestyle blocks at a limited number of locations it is intended to minimise the potential for friction between lifestylers and full-time farmers over the impact of amenity values of some farming operations. Also, by offering lifestylers the opportunity of obtaining a site in a Countryside Living Activity Area some of the pressure for sites for countryside living in the Production, Special Character and Conservation Activity Areas that make up the rest of the rural area of the District may be reduced, with benefits to the natural character and economics of farming in those areas."

[13] There are eight such areas. The Environment Court concluded that while provision for rural residential dwellings was specifically provided for in these eight areas, change 55 "nevertheless recognises that some rural-residential subdivisions can be expected to occur in the general rural activity area". The key issue in relation to question one is whether that conclusion was correct as a matter of law. If it was, Chambers J was in error in coming to the view that the Environment Court misinterpreted or misunderstood the relevant objectives and policies. As in the *Arrigato* case, we consider that the decision of the High Court represents more of an independent assessment by the Judge than a consideration by him of whether the conclusion to which the Environment Court came was open to it in law. The Judge did not interpret the

objectives and policies and then identify the manner in which they had been misinterpreted or misunderstood by the Environment Court. Rather he worked backwards. He reasoned that because the proposal was not consistent with the objectives and policies, as he saw them, the Court must have misinterpreted or misunderstood them. There is a difficulty with that reasoning. The Environment Court may well have taken a different view from the Judge about whether the proposal was contrary to the objectives and policies. It was not for the Judge to differ on an appeal limited to questions of law.

[14] The Judge also appears not to have given sufficient attention to the fact that in the case of a non-complying activity, one cannot expect to find support for the activity in the plan. The crucial question was whether the proposed development was contrary to the objectives and policies of the plan. If it was, the proposal did not satisfy gateway (b) and, although s 104(1)(d) requires the consent authority only to have regard to any relevant objectives and policies, the error at the gateway stage must be regarded as having infected the s 104 consideration.

[15] The key focus is therefore on whether it was open to the Environment Court to take the view that the proposal was not contrary to the relevant objectives and policies. The Judge in effect held that it was not open to the Court to do so; albeit, as we have said, his judgment did not address the matter quite in that way. We have come to the view, after a careful consideration of the objectives and policies, that the Environment Court's conclusion that the proposal was not contrary to them, did not represent any misconstruction of their terms. Thus in reaching its conclusion the Environment Court did not err in law.

[16] The general objective set out above signals a desire to maintain flexibility to accommodate future rural land use options. Thus rural residential type activities are not ruled out altogether at the general level. Indeed at the end of the general objective, there is specific reference to opportunities for countryside living and lifestyle activities. The general reference to subdivisions signals an intent to limit them but such limitation itself contemplates a limited pool of rural residential sites. The phrase "such as" which introduces examples of those wishing to utilise such sites, does not involve any limitation to the examples given. The two relevant policies continue the same theme. Policy 2 contemplates some "dispersed" countryside living and one-off activities, not necessarily confined to the eight specifically designated areas.

[17] Although the Environment Court noted that policy 2 was subject to appeal, we were informed that all appeals have now been resolved and there was no suggestion that policy 2 had undergone any material change. Policy 4 refers to the facilitation of countryside living opportunities focused on specified areas. Those areas have been provided for in the plan. But the policy, in its reference to the extension of countryside living areas and its earlier reference to focusing on specified areas, does not indicate that the policy is to confine countryside living to such areas or to place a complete embargo on such activity outside those areas. Indeed the general objective of the specified areas is to reduce "some of the pressure" on the ordinary rural area.

[18] The question of law before us relates to the RDC's plan and whether the Environment Court misinterpreted or misunderstood its objectives and policies. We do not therefore consider it necessary to go wider into regional documents, there being no suggestion that there was any clash between such regional documents and the plan under consideration.

[19] After he had set out his summary of the Environment Court's reasoning, the Judge said at p 57:

> " **[27]** That reasoning demonstrates a clear misunderstanding of the objectives and policies of the transitional plan and Change 55. It ignores the principal objective of the Rural 1 (General Rural) zone which is 'to preserve the capacity of the land for food and other forms of primary production'. It ignores the fact that the district council, after public consultation, has provided rules for rural-residential subdivision of land which is of lower quality for food production. Those standards are set out at para [14] above. It ignores the fact that this subdivision proposal is quite at odds with those standards. It ignores the fact that the council has provided for rural-residential development by the enactment of special zones. No doubt those zones were selected following 'an integrated consideration of the relevant issues', with extensive input from those living in the district. It has ignored the overall thrust of the planning documents, both at regional level and at district level to contain urbanisation of the countryside to specific areas."

[20] We must say, with respect, that the Judge's repeated use of the word "ignores" is problematic. We do not think the Judge can have intended to use the word literally because the Environment Court expressly referred to many of the matters said to have been ignored. The concept of ignoring is also difficult to reconcile with the Judge's ultimate conclusion that the Court had misinterpreted or misunderstood the objectives and policies. If the Judge intended to convey by his use of the word "ignores" the proposition that the Environment Court had given no or insufficient weight to the matters he listed, he either fell into the error of substituting his own assessment of what weight certain factors should have for that of the Court, or in reality found an error of law different from that which he said formed the basis of his conclusion. Failing to give any weight to a relevant consideration is broadly equivalent to failing to take account of a relevant consideration. It is not equivalent to misunderstanding or misinterpreting a plan provision to which, ex hypothesi, you have given consideration.

[21] Another issue was whether the Judge was correct in saying at p 57, para [28] that the restorative tree-planting dimension was the crucial factor leading to the success of the application. The Environment Court was not however influenced in its conclusion that change 55 recognised that some rural residential subdivisions could be expected to occur in the general rural activity area by its separate emphasis on the tree-planting dimension. The conclusion in question came after a careful and detailed examination of the relevant objectives and policies which the Court had set out in full. That aspect of the decision contained no reference to tree planting at all. Whether the Judge was correct in saying that the restorative tree-planting dimension was the crucial factor is of no present moment. What can be said is that the tree-planting dimension did not improperly influence the Court's approach to gateway (b) and s 104(1)(d).

[22] At the end of para [33] on p 59, the Judge implied that the Environment Court had been selective in its reading of what he called the statutory documents. He also said that to do so would be a perverse exercise of the discretion given to a consent authority. This implied criticism of the Environment Court was unjustified. The use of the word "perverse" was

unfortunate. Even if the Court had misunderstood or misinterpreted the documents, it can hardly be said to have been selective in its reading of them or to have acted perversely.

[23] In reaching our conclusions we have given full consideration to the submissions of Mr Cowper for the ARC and Mr Loutit for the RDC. As a general observation we do not consider those submissions focused sharply enough on the actual provisions of the relevant objectives and policies. The question of law inherent in question one is a confined one. It focuses on the "district plan", meaning the RDC's operative plan and specifically change 55. While we accept that regional and national documents and the provisions of Part II of the Act can have a bearing on what is contained in a plan, the starting point when considering the objectives and policies of the plan must surely be with those objectives and policies themselves. Nor do we consider the councils' submissions took sufficiently into account that this was an application for a non-complying activity which, ex hypothesi, was not going to comply with the plan. The essential question was whether it was contrary to the objectives and policies of the plan properly construed.

[24] We do not have before us, and therefore do not need to consider, what the situation would be if the objectives and policies of a plan are inconsistent with or contrary to the terms of a regional plan or other document or indeed the provisions of Part II. As pointed out in *Arrigato*, Part II, in its reference in s 6(a) to subdivisions, refers to the protection of the specified values from inappropriate subdivision and s 11 contemplates that a subdivision may be allowed by a rule in a district plan or by a resource consent and such a consent can of course be given to a non-complying activity, subject always to the provisions of ss 104 and 105. There was no suggestion in the present case that the objectives and policies of the district plan were contrary to higher level planning factors. It was suggested that the proposal itself was contrary to those higher-level documents, but the essential focus for present purposes is on the objectives and policies of the district plan which were not said to be inconsistent with those higher-level matters.

[25] In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. We are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.

[26] For these reasons our answer to question one is that the High Court was not correct in holding that the Environment Court had misinterpreted or misunderstood the objectives and policies of the district plan. The application was therefore not wrongly assessed under ss 104(1)(a) and 105(2A)(b).

Questions two and three: precedent and cumulative effects

[27] These two questions can be dealt with together as they effectively cover the same ground. Question two is whether the High Court was correct in holding that the Environment Court had made an error of law in limiting its consideration of cumulative effects solely to "rural character", and in failing to consider all of the cumulative effects of the proposed subdivision. Question three asks whether the High Court was correct in holding that the Environment Court had made an error of law in finding that the application would not give rise to "precedent" effects under s 104 of the Act.

[28] The Environment Court found that to grant consent to the subdivision would not result in a loss of rural character, either in relation to the particular subdivision or from the point of view of the effects the granting of the present application might have on future applications of a like nature. Chambers J held at p 61, para [44] that the Environment Court had erred in law in not having regard to:

> "the cumulative wastewater, stormwater, ecological, roading, and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one."

[29] The Judge continued:

> " **[44]** . . . Mr Cowper submitted that these additional cumulative effects had to be addressed in a comprehensive manner. He said that had been done in the regional policy statement and the conclusion that the regional council had there come to was quite different from the approach of the Environment Court. The Court had simply ignored the regional council's and district council's conclusions as expressed in their respective planning documents.
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> **[45]** Mr Cowper said that while the concept of restorative subdivision might be innovative and beneficial in respect of one particular property in an area, that did not mean the repetition of that idea throughout the area on an ad hoc site by site basis would necessarily be beneficial as well. Unless an area-wide assessment was carried out with input from all relevant areas of expertise, the consequences of, for example, the increase in population density resulting from all like proposals might have adverse effects which are quite unforeseen when restorative subdivision is looked at in respect of an individual site.
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> **[46]** In my view, that criticism is justified and the Environment Court did fail adequately to consider all the cumulative effects of this grant of a resource consent. In limiting itself to a consideration of cumulative effects solely to 'rural character', the Court made an error of law. This error means that the Court will need to reconsider the 'effects' of allowing the activity in terms of s 104(1)(a). In addition, the Court will need to reassess the first threshold test (s 105(2A)(a)) as to whether 'the adverse effects on the environment' of the non-complying activity will be minor."

[30] The Environment Court proceeded on the basis that the evidence before it in relation to each of the matters referred to by the Judge, ie wastewater,

stormwater and so on, was that no extension of public infrastructure was required to service the lots to be created by the proposed subdivision. Notwithstanding this assessment by the Environment Court, the High Court held that it was an error in law not to have made an area-wide assessment with input from all relevant areas of expertise. It should be noted at the outset that the Judge's approach would substantially increase the ambit and cost of an application such as the present, and indeed make such applications significantly more extensive and complicated.

[31] There are really two legal aspects to the issues which were raised by the parties when they argued questions two and three. The first concerns the concept of precedent in this field, and the second concerns the concept of effects and in particular that of cumulative effects. It is convenient to deal with precedent first.

Precedent

[32] The granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles, because all resource consent applications must be decided in accordance with a correct understanding of those principles. But a consent authority is not formally bound by a previous decision of the same or another authority. Indeed in factual terms no two applications are ever likely to be the same; albeit one may be similar to another. The most that can be said is that the granting of one consent may well have an influence on how another application should be dealt with. The extent of that influence will obviously depend on the extent of the similarities. The present application had a number of particular features which have already been noted. The most significant of them for present purposes are: the lack of any need for extension of the public infrastructure; the poor productive quality of much of the relevant land; the largely rural residential character of the locality; and the existence of the two nearby restaurants. The Environment Court's view on the question of precedent effect was, at para [75]:

> " **[75]** In this instance we do not consider that a precedent will be set by granting the application. As we have said, the proposal:
>
> - does not detract from the rural character;
> - does not exclude land of high productive capacity from primary production; and
> - makes detailed provision for substantial restoration of land that has suffered from the debilitating effects of past development."

[33] We consider that the Environment Court was entitled in law to come to the conclusion that no precedent would be set by granting the application. The suggestion that the three bullet points comprise a checklist and any other application satisfying those three points would have to be granted is unpersuasive. The Court was obviously emphasising the matters that it regarded as particularly relevant to the instant case. Even if those three same matters could be found in another case, it would be naïve to suggest that this would require the consent authority to grant approval, irrespective of all the particular features of the application. It is self-evident that the Environment Court was not endeavouring to set out a checklist for future cases. There was also a criticism of the Court because it had failed to refer to the issue of cumulative effects in the so-called checklist. We will address that issue separately a little later.

[34] We cannot accept Chambers J's conclusion at p 60, para [38] that the Court was:

> ". . . wrong if it considered that no precedent was being set by the granting of this application. The evidence before the Court was that Mr Dye's land, including its productive capacity, is typical of land throughout the Rodney District. There was nothing exceptional about this farmland."

[35] The Judge was of course concerned only with errors of law. His reference to the Environment Court being "wrong" was not in terms a finding that the Court was wrong in law. Indeed the Judge's reference, in the very next sentence, to the evidence before the Court reinforces the impression that the Judge was moving outside the scope of matters of law. The Judge expressed the view that the Court's decision "if it stood would have significant precedent effect". That was his own assessment. What he should have been considering was whether the Environment Court was wrong in law in holding that its decision would have no precedent effect. What is more, we cannot identify anything in the Environment Court's decision to justify the Judge's statement of fact that the Dyes' land, including its productive capacity, was typical of land throughout the Rodney district.

[36] For these reasons we are of the view that the Judge was himself in error of law when he held that the Environment Court had made an error of law in finding that the Dyes' application would not give rise to "precedent effects" under s 104 of the Act. We turn now to the topic of effects and cumulative effects.

Effects and cumulative effects

[37] Section 3 of the Act defines the term "effect" in a non-exhaustive way:

> **3. Meaning of "effect" –** In this Act, unless the context otherwise requires, the term "effect" . . . includes –
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> (a) Any positive or adverse effect; and
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> (b) Any temporary or permanent effect; and
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> (c) Any past, present, or future effect; and
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> (d) Any cumulative effect which arises over time or in combination with other effects –
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> regardless of the scale, intensity, duration, or frequency of the effect, and also includes –
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> (e) Any potential effect of high probability; and
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> (f) Any potential effect of low probability which has a high potential impact.

[38] The present issue is the way the word "effects" should be construed in ss 104 and 105 of the Act. Each section is concerned, in its relevant part, with effects on the environment. In s 104(1)(a) the focus is on "any actual and potential effects on the environment of allowing the activity". In s 105(2A)(b) it is on "the adverse effects on the environment". The definition of "effect" includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in

combination with other effects". The concept of cumulative effect arising over time is one of a gradual build-up of consequences. The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration. The same connotation derives from the words "regardless of the scale, intensity, duration, or frequency of the effect".

[39] Potential effects, by contrast, are effects which may happen or they may not. Their definition incorporates levels of probability of occurrence. A high probability of occurrence is enough to qualify the potential effect as an effect, whereas a potential effect which has a low probability of occurrence qualifies as an effect only if its occurrence would have a high potential impact. The definition is such that any "precedent" effect which may result from the granting of a resource consent is not within the concept of a cumulative effect. That concept is confined to the effect of the activity itself on the environment. If the precedent effect of granting a resource consent is to fit within the definition at all, it must do so by dint of its potential effect and it would then have to satisfy the probability and, if applicable, the potential impact criteria. It is unnecessary to say more at a general level.

[40] The present case involves a consideration of the concept of effect for the purposes of ss 104 and 105. It is logical to start with s 105. The question in gateway (a) is whether the adverse effects on the environment will be no more than minor. This question, as discussed above, is directed to the effect of the non-complying activity itself. It is concerned with the effects of that activity as it impacts on the environment. The question cannot reasonably be regarded as involving any precedent effect deriving from the granting of the resource consent. That, in context, would involve an unnatural and unintended extension of the concept of the environment.

[41] As noted, s 104(1)(a) requires the consent authority to have regard to "any actual and potential effects on the environment of allowing the activity" in question. In this respect we consider Parliament has implicitly abandoned the s 3 definition of "effect" which only applies unless the context otherwise requires. Had Parliament wished to adopt the definition, it would have used simply the word "effects" (as in s 105(2A)) rather than the words "any actual or potential effects". Indeed if the definition is invoked it would have the awkward consequence that s 104(1)(a) would be dealing with actual potential effects and potential potential effects. Everything points to a deliberate intention here to address only effects which are "actual" and "potential"; albeit putting the matter that way is in any case inherently very wide and capable of capturing some, if not all, of the subtleties of the s 3 definition. So far therefore, in spite of the seemingly deliberate decision not to rest on the defined term "effect", it is not easy to see what confining purpose the legislature may have had.

[42] The next point is the same as that which applies to s 105(2A)(a). It is the effects on the environment which are being addressed. Section 104(1)(a) was brought into line with s 105(2A)(a) in this respect by the 1993 amendment to the Act. Furthermore, the focus is on the effects on the environment of allowing the relevant activity. The use of the words "of allowing the activity" could be thought to signal an intention that precedent effects are here intended to be brought into account. The words used are not "any . . . effects of the activity on the environment". However, we consider such a conclusion would be too subtle and not in accordance with the purpose and policy of s 104(1)(a) viewed as a

whole. As with gateway (a), we consider para (a) of s 104(1) is concerned with the impact of the particular activity on the environment. It is not concerned with the effect which allowing the activity might have on the fate of subsequent applications for resource consents. If there is a concern at precedent effect, it should be addressed under para (d) of s 104(1) which is similar in concept to gateway (b) in s 105(2A); albeit para (d) does not have the same constraining effect as gateway (b). Alternatively precedent concerns may be addressed under para (i) of s 104(1).

[43] How then does all this relate to the question before us? The approach adopted by Chambers J resulted in his finding that the Environment Court had erred in law. It did so, in his view at p 61, para [44] by failing to have regard to:

> ". . . the cumulative wastewater, stormwater, ecological, roading, and surfacing [sc: servicing] effects of the change in land use and in the population densities which might result from the number of restorative subdivision proposals which might follow from allowing this one."

[44] The Judge was of the view that it was necessary for the Environment Court to carry out what he described as an area-wide assessment with input from all relevant areas of expertise. He said that the increase in population density resulting from all like proposals might have adverse effects which were quite unforeseen when the matter was looked at from the point of view of an individual site.

[45] In order to be able to hold that the Environment Court's failure to make the Judge's "area-wide assessment" amounted to an error of law, the Judge must have been of the view that what had been omitted was a mandatory requirement. We cannot accept that proposition. The correct approach to the concept of effects, as described in our earlier discussion, does not make it mandatory to adopt the sort of exercise the Judge had in mind. Nor does s 104(1)(d) have that consequence, the more so in the light of the Environment Court's conclusion, which we have held not to have been erroneous in law, that the proposed subdivision was not contrary to the objectives and policies of the plan. There are good policy reasons why such an inquiry as that contemplated by the Judge should not be regarded as mandatory in present circumstances. Compliance with the manifold requirements of the Resource Management Act is already complicated and expensive enough as it is; some would say too complicated and expensive. To require applicants for consent to non-complying activities to entertain, on a mandatory basis, an area-wide inquiry to deal with all the possible future implications of the granting of the particular consent, would impose very considerable additional burdens on all concerned. It would also be a rather speculative exercise.

[46] We are reinforced in the view we take by the following passage from the decision of the Environment Court in *Wellington Regional Council (Bulkwater) v Wellington Regional Council* (Environment Court, Wellington, W 3/98, 7 January 1998, Judge Treadwell) at pp 7 – 8:

> "For our part we cannot see any rush of applications for resource consents for abstraction but if there were and if they were of significance, then each would need to be considered on its merits. We do not accept that the RMA allows us to arbitrarily refuse an application for a resource consent on the basis that hypothetical applicants may appear and be granted consents based on a grant of this consent without further

examination of the capacity of the resource. It is our opinion that the 1993 amendment to the RMA by including the word 'environment' in s 104(1)(a) clearly intended to restrict the word 'effect' (which was previously unqualified). This brought s 104 into line with s 105(2)(b)(i) relating to adverse effects upon the environment. That evinced a deliberate legislative intent and it is our opinion that to now attempt to define the word 'effect' in s 3 as referring to conjectural future actions by persons unknown who are not even parties to proceedings is stretching the intention of Parliament beyond that intended by this Act. The word 'effect' now has the s 104 qualification that it must be 'on the environment'. Furthermore to even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dike to be breached without evincing any further interest and control, merely because it has granted one consent."

[47] We were informed by Mr Brabant that this case had been cited to Chambers J; albeit he did not refer to it in his judgment. We agree with the views of the Environment Court in this passage, the last sentence of which seems particularly apt to the matters we are now considering. In coming to its conclusions the Environment Court was not required as a matter of law to take into account what were characterised in argument as potential cumulative precedent effects. Mr Burns for the ARC put it that his client was concerned with the macro issues which the case raised, such as population increases outside the areas designated for rural residential living. We do not consider that the facts of the present case were such that the Environment Court erred in law by not specifically addressing that sort of issue.

[48] Mr Burns asked rhetorically to what extent the activity consented to was likely to be repeated throughout the area and if it was to any appreciable extent, what the consequences of that would be. Conversely he asked rhetorically whether this case represented a genuine one-off situation. We infer that the Environment Court considered on the evidence that the case was in a genuine one-off category, and its present ruling can properly be viewed in that light. We cannot accept counsel's submission that the Environment Court was establishing a precedent while at the same time saying it was not doing so. In coming to our conclusions, we have also taken into account the submissions made by Mr Loutit on behalf of the RDC which it is not necessary to address separately.

[49] We can summarise our views on both questions two and three in the following way. The precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for consent to a non-complying activity. The issue falls for consideration under s 105(2A)(b) and s 104(1)(d). Cumulative effects properly understood should also be taken into account pursuant to s 105(2A)(a) and s 104(1)(a). But in taking those matters into account, the consent authority has no mandatory obligation to conduct an area-wide investigation involving a consideration of what others may seek to do in the future in unspecified places and unspecified ways in reliance on the granting of the application before it. The High Court was not correct in its conclusion that the Environment Court had erred in law in failing to consider, in the sense adopted by the High Court, "all of the cumulative

effects of the proposed subdivision". Nor was the High Court correct in holding that the Environment Court had erred in law in finding that Mr Dye's application would not give rise to "precedent effects under s 104 of the Act".

Formal orders

[50] For the reasons given each of the questions is answered No – the High Court was not correct. The appeal is accordingly allowed. The orders made in the High Court are set aside. In their place we substitute an order dismissing the appeal from the Environment Court to the High Court. Mr Dye is entitled to costs in this Court in the sum of $5000, plus disbursements including the reasonable travel and accommodation expenses of two counsel to be fixed if necessary by the Registrar. Those costs and disbursements to be paid equally by the ARC and the RDC. Costs in the High Court are to be fixed, if necessary, in that Court in the light of this decision.

Appeal allowed.

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Solicitors for the ARC: *Bell Gully* (Auckland).
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Reported by: James Kirk, *Barrister*