Videbeck v Auckland City Council

High Court Auckland M 1053-SW/02
20, 27 September 2002
Heath J

Resource management – Judicial review – Notification – Scheme and purpose of Part VI relating to notification – Whether report on assessments balanced – Whether decision maker able, on basis of information supplied, to make independent decision – Whether decision making amounted to "rubber-stamping" and de facto sub-delegation – Whether decision valid to grant resource consents on non-notified basis – Resource Management Act 1991, ss 34(4), 88, 92, 93, 94(2), 96, 100, 115, 116, 120, Fourth Schedule.

Judicial review – Remedies – Resource management – Notification – Validity of decision not to notify application – Unreasonableness – Application of principle of Wednesbury *unreasonableness – Relief – Whether relief available where both parties innocent – Balancing of relevant factors and prejudice.*

Judicial review proceedings were filed by a resident, Mr Videbeck, to challenge the decision of the Auckland City Council to grant a resource consent on a non-notified application by Kaitoke Valley Ltd (Kaitoke) for a discretionary activity on the property next door to Mr Videbeck. Mr Videbeck's position was that the application should have been notified because of the potential for significant adverse effects to his property from the proposed activity. He had not given approval to the matter going ahead on a non-notified basis. In an initial application, Mr Videbeck was granted ex parte interim relief, upheld at a hearing of the parties, with orders preventing specified parts of the activity from going ahead, subject to an undertaking as to damages.

Under the scheme of Part VI of the Resource Management Act 1991 (the Act), the presumptive rule is that once a consent authority is satisfied that it has adequate information on which the proposed activity can be assessed, it must ensure public notification of the application, unless an exemption to public notification is available under s 94. The policy underpinning this scheme is that the process be both public and participatory. Judicial review is the only remedy available to challenge a decision made under s 94. Under this jurisdiction, the Court exercises a supervisory role to ensure that statutory powers are exercised in accordance with the law.

Held: 1 The power not to notify an application conferred by s 94(2) had to be considered in two stages:

(a) a consent authority had to be satisfied that the threshold requirements are met, namely;
  (i) that any adverse effect on the environment would be no more than minor; and

(ii) that written approval was obtained from every person whom the consent authority was satisfied may be adversely affected; and

(b) if those two requirements were met, the consent authority had then to exercise a discretion as to whether or not to notify the application (see para [27]).

Bayley v Manukau City Council [1999] 1 NZLR 568 (CA) applied.

2 In determining whether a decision under s 94 not to notify an application was to be characterised as "unreasonable" in the *Wednesbury* sense, the Court had to bear in mind that the effect of a non-notification decision was to deny the public, or a particular member of the public, the right to be heard on the decision. The Court was to consider:

(a) whether there was sufficient information for the decision maker to determine whether the threshold requirements had been met;

(b) the experience and expertise of the decision maker; the Court would be more ready to interfere where the issue was one of sufficiency of information than if it were a decision made in a quasi-political context by elected representatives; and

(c) if the Court was satisfied that the information was sufficient to enable a reasonable consent authority to judge whether the threshold requirements were met, the Court would ask itself whether the discretionary decision on whether or not to notify the application was one which no consent authority, acting reasonably, could properly have made (see para [34]).

3 For a valid decision to be made under delegation in relation to non-notification under s 94(2), the decision maker had to be given a balanced report, containing all relevant information, including any contrary views, so as to allow the decision maker to assess the competing views and make an independent decision. The report on which the decision was made had not been balanced as it did not refer to the fact that Mr Videbeck had asked to be heard and had not given approval to the proposed activity. Nor did it mention certain adverse effects included in an expert report. The decision maker therefore had not had sufficient information to be able to make an independent and impartial assessment of whether the application should or should not be notified publicly. The Court would not permit "rubber-stamping" by the decision maker of recommendations from officials, nor de facto delegations contrary to the requirements of s 34(4)(d) of the Act. The decision was therefore susceptible to review (see paras [60], [68], [69], [70]).

Bayley v Manukau City Council [1999] 1 NZLR 568 (CA) considered.

Wellington City Council v Woolworths New Zealand Ltd (No 2) [1996] 2 NZLR 537 (CA) considered.

4 Although the decision not to notify was flawed, the question of relief was difficult, because both parties, Mr Videbeck and Kaitoke, were innocent. Whatever the decision, an innocent party would be prejudiced. Balancing the relevant interests of both parties "in the peculiar circumstances of this case", relief would be refused, conditional upon Kaitoke not enforcing Videbeck's undertaking as to damages (see paras [71], [75], [76], [77]).

Interim orders discharged: declaration that determination not to notify was invalid: relief declined on conditions.

Other cases mentioned in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; [1947] 2 All ER 680 (CA).
Barrett v Wellington City Council [2000] NZRMA 481.
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 All ER 935.
King v Auckland City Council [2000] NZRMA 145; 6 ELRNZ 79.
McAlpine v North Shore City Council [1999] NZRMA 530.
Ports of Auckland Ltd v Auckland City Council [1999] 1 NZLR 601.
Worldwide Leisure Ltd v Symphony Group Ltd [1995] NZAR 177.

Application for review

This was an application by Marc Videbeck for judicial review of the decision of the Auckland City Council, first defendant, publicly not to notify a resource consent application by Kaitoke Valley Ltd, second defendant.

M J E Williams for Mr Videbeck.
L M M Riddiford and *B C Parkinson* for the council.
M G Keall for Kaitoke.

Cur adv vult

HEATH J.

The issues

[1] This is an application for judicial review of a decision made by the Auckland City Council (the council) to grant, on a non-notified basis, a resource consent involving a discretionary activity. The application raises a number of questions involving the approach which this Court should take in exercising its supervisory jurisdiction to review decisions made by consent authorities not to notify the public of such applications.

Background facts

[2] Mr Videbeck is the registered proprietor of a property situated at 36 Eden Terrace, Waiheke Island. Kaitoke Valley Ltd (Kaitoke) is the registered proprietor of land situated at 34 Eden Terrace, Waiheke Island.

[3] In March 2002 Kaitoke applied to the council for a resource consent to relocate a dwelling on the property at 34 Eden Terrace.

[4] It is common ground that it was necessary for Kaitoke to apply for a resource consent to carry out discretionary activities because:

(a) Kaitoke proposed to relocate the dwelling on to the site approximately 1.5 m from the front yard boundary, thereby creating a 2.5 m infringement of the 4 m front yard building set-back imposed by R 6B.1.2.3 of the relevant district plan;
(b) Kaitoke proposed to remove 45 generally protected ponga trees, thereby requiring consent under R 6C.1.3.3 of the relevant district plan; and
(c) Kaitoke proposed to relocate the dwelling within 6 m of a wetland water system, thereby creating a 14 m wetland water system yard infringement under R 6C.1.3.7 of the relevant district plan.

[5] The properties at 34 and 36 Eden Terrace are contiguous. The property at 34 Eden Terrace is to the east of the property at 36 Eden Terrace. The land is zoned "traditional residential" in the operative district plan administered by the council.

[6] Mr Videbeck learnt informally of the proposed application. He wrote to the council by letter dated 17 May 2002 which was followed by a subsequent letter from his counsel to the council dated 20 June 2002. Reference will be made to that correspondence later in this judgment.

[7] Although Mr Videbeck, in the relevant correspondence, had expressed an interest in being heard on the application, a decision was made on 7 August 2002, by Ms Hewitt, the council's senior specialist planner, acting under delegated authority, granting the resource consents sought on a non-notified basis. The ability for a local authority to delegate such functions, powers or duties to any officer of the local authority is set out in s 34(4) of the Resource Management Act 1991 (the Act).

[8] On 22 August 2002 counsel for Mr Videbeck wrote to the relevant planning officer advising that judicial review proceedings would be launched to challenge the decision to deal with the applications on a non-notified basis. A filing date of 27 August 2002 was indicated. In the meantime, however, activities came to the attention of Mr Videbeck which made the need for proceedings more urgent.

[9] An ex parte order under s 8 of the Judicature Amendment Act 1972 was made on the application of Mr Videbeck at 1.15 pm on 26 August 2002 by Chambers J. The order made by Chambers J was in the following terms:

> "(a) The second defendant not commence and/or cease forthwith any works in reliance on the resource consent granted to it on 7 August 2002 for the relocation of an existing dwelling on the land comprised and described in CT 47A/1355, being the property at 34 Eden Terrace, Onetangi, Waiheke Island.
>
> (b) That this order include (but not be limited to) a prohibition on any works preparatory to and associated with clearance of any ponga trees or other indigenous vegetation on the land, and apply until further Order of the Court.
>
> (c) Costs are reserved.
>
> (d) The plaintiff is to serve the defendants immediately with copies of all documents filed to date, including a copy of the sealed order.
>
> (e) The matter is to be called afresh in the High Court on Tuesday 27 August at 10 am before Heath J."

[10] I heard the application for interim relief on 27 August 2002. For reasons given in my oral judgment of 27 August 2002 I held that interim relief ought to be granted and made the following orders in substitution for those made the previous day by Chambers J:

> "(a) That the second defendant or its agent not carry out any further work in reliance on the resource consent granted to it on 7 August 2002 for the relocation of an existing dwelling on the land comprised and described in certificate of title 47A/1355 being the property at 34 Eden Terrace, Onetangi, Waiheke Island, pending further Order of the Court.
>
> (b) As a condition of the order, the undertaking as to damages given by Mr Videbeck on 26 August 2002 shall be incorporated into the formal order sealed by the Court as a result of this judgment. That will ensure that any wasted costs incurred by Kaitoke which are linked directly to failure of the application on a substantive basis, should that occur, can be claimed by Kaitoke.

(c) The ponga trees which have been removed from the property at 34 Eden Terrace and placed on the northern side of the roadway be reinstated within the cleared platform in a manner which will ensure their survival pending determination of the substantive application for judicial review. The cost of that replacement shall be borne in the first instance by Kaitoke given the conditions which were imposed in the resource consent. But if Mr Videbeck's application for judicial review is unsuccessful, the cost of removing the ponga trees from where they will be replanted to the location chosen by Kaitoke in accordance with the conditions granted in the resource consent of 7 August 2002, shall be borne, in any event, by Mr Videbeck.

(d) All necessary measures shall be taken by the Auckland City Council to ensure that there are no adverse off-site effects in terms of sedimentation of the adjacent wetland or discharge of sediment on to adjacent properties pending determination of the substantive judicial review application. It will be for the Auckland City Council to ensure that its officers carry out that task appropriately.

(e) Leave to apply is reserved to any party, on 24 hours' notice should any urgent matters arise that require relief."

[11] In addition, timetabling orders were made to ensure that the substantive application for judicial review could be dealt with promptly.

[12] I heard the substantive application for judicial review on 20 September 2002. At the conclusion of the hearing on 20 September 2002 I reserved my judgment.

The statutory scheme

[13] Part VI of the Act contains a code which governs the making and determination of applications for various types of resource consents. What follows is a summary of the scheme of Part VI of the Act, so far as is relevant for the purposes of this case.

[14] Applications for resource consents must be made pursuant to s 88 of the Act. Section 88(4)(b) of the Act requires an application for a resource consent to include an assessment of any actual or potential effects that the activity may have on the environment, and the ways in which any adverse effects may be mitigated. Section 88(5) of the Act qualifies that obligation, in respect of controlled activities or discretionary activities over which the local authority has restricted the exercise of its discretion, by restricting the assessment to those matters specified in a district plan or proposed district plan over which the local authority has retained control or to which the local authority has restricted the right to exercise its discretion, as the case may be.

[15] Section 88(6) of the Act provides:

> (6) Any assessment required under subsection (4)(b) or subsection (5) –
>
> (a) Shall be in such detail as corresponds with the scale and significance of the actual or potential effects that the activity may have on the environment; and
>
> (b) Shall be prepared in accordance with the Fourth Schedule.

[16] The Fourth Schedule to the Act sets out those matters to be addressed in the assessment of actual or potential effects of the discretionary activity on the environment. Clauses 1 and 2 of the Fourth Schedule provide:

Assessment Of Effects On The Environment

1. **Matters that should be included in assessment of effects on the environment** – Subject to the provisions of any policy statement or plan, an assessment of effects on the environment for the purposes of section 88(6)(b) should include –

(a) A description of the proposal:

(b) Where it is likely that an activity will result in any significant adverse effect on the environment, a description of any possible alternative locations or methods for undertaking the activity:

(c) *Repealed*

(d) An assessment of the actual or potential effect on the environment of the proposed activity:

(e) Where the activity includes the use of hazardous substances and installations, an assessment of any risks to the environment which are likely to arise from such use:

(f) Where the activity includes the discharge of any contaminant, a description of –

(i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects; and

(ii) Any possible alternative methods of discharge, including discharge into any other receiving environment:

(g) A description of the mitigation measures (safeguards and contingency plans where relevant) to be undertaken to help prevent or reduce the actual or potential effect:

(h) An identification of those persons interested in or affected by the proposal, the consultation undertaken, and any response to the views of those consulted:

(i) Where the scale or significance of the activity's effect are such that monitoring is required, a description of how, once the proposal is approved, effects will be monitored and by whom.

2. **Matters that should be considered when preparing an assessment of effects on the environment** – Subject to the provisions of any policy statement or plan, any person preparing an assessment of the effects on the environment should consider the following matters:

(a) Any effect on those in the neighbourhood and, where relevant, the wider community including any socio-economic and cultural effects:

(b) Any physical effect on the locality, including any landscape and visual effects:

(c) Any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:

(d) Any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural, or other special value for present or future generations:

(e) Any discharge of contaminants into the environment, including any unreasonable emission of noise and options for the treatment and disposal of contaminants:

(f) Any risk to the neighbourhood, the wider community, or the environment through natural hazards or the use of hazardous substances or hazardous installations.

[17] While s 88 of the Act refers to an application for a resource consent being made "to the relevant local authority" subsequent provisions in Part VI refer to the local authority having jurisdiction to act as a "consent authority". The term "consent authority" is defined in s 2(1) of the Act as including a local authority whose permission is required to carry out an activity for which a resource consent is required under the Act.

[18] A consent authority is given the power, at any reasonable time before the hearing of an application for a resource consent, to require an applicant to provide further information relating to the application: s 92(1) of the Act. Furthermore, where the consent authority is of the opinion that any significant adverse effect on the environment may result from an activity to which an application for a resource consent relates, the consent authority may utilise powers under s 92(2) of the Act to:

> (a) Require an explanation of –
>
> (i) Any possible alternative locations or methods for undertaking the activity and the applicant's reasons for making the proposed choice; and
>
> (ii) The consultation undertaken by the applicant; and
>
> (b) Where the application is for a discharge permit or a coastal permit to do something that would otherwise contravene sections 15 (relating to discharge of contaminants) or 15B, require an explanation of –
>
> (i) The nature of the discharge and the sensitivity of the proposed receiving environment to adverse effects, and the applicant's reasons for making the proposed choice; and
>
> (ii) Any possible alternative methods of discharge, including discharge into any other receiving environment; and
>
> (c) Commission a report on any matters raised in relation to the application, including a review of any information provided in an application under section 88(4) or under this section.

[19] Where further information is sought by a consent authority under s 92 the consent authority may postpone the notification of the application, the determination of the application (if there is no hearing) or the hearing of the application until the information is received: s 92(3)(a) of the Act. All information sought shall be made available for public inspection at least 15 working days before the hearing: s 92(3)(b) of the Act.

[20] Further information may be sought by the consent authority *only if* the information is *necessary* to enable the consent authority to better understand the nature of the activity in respect of which the application has been made, the effect it will have on the environment or the ways in which any adverse effects may be mitigated: s 92(4) of the Act.

[21] The presumptive rule is that once a consent authority is satisfied that it has received adequate information about the application it must ensure that the application is notified in accordance with s 93 of the Act.

[22] Section 94 of the Act sets out the circumstances in which a consent authority can dispense with the need for notification of applications for resource consents. In addition, certain types of resource consents are excluded from the public participatory process – for example, a subdivision consent, if the subdivision is a controlled activity: see s 94(1)(a) of the Act. In this particular

case it is common ground that the only jurisdiction for the consent authority to dispense with the need for notification arises from s 94(2) of the Act. Section 94(2) of the Act states:

> (2) An application for a resource consent need not be notified in accordance with section 93, if the application relates to a discretionary activity or a non-complying activity and –
>
> (a) The consent authority is satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor; and
>
> (b) Written approval has been obtained from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent unless the authority considers it is unreasonable in the circumstances to require the obtaining of every such approval.

[23] Section 94(2) of the Act was considered recently by the Court of Appeal: *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA). The Court of Appeal emphasised that the policy underlying Part VI of the Act was one involving a process which was both public and participatory. At pp 575 – 576, Blanchard J, delivering the judgment of the Court, said:

> "Section 94 spells out exceptions which are carefully described circumstances in which a consent authority may dispense with notification. In the exercise of the dispensing power and in the interpretation of the section, however, the general policy [involving a public and participatory process] must be observed. *Care should be taken by consent authorities before they remove a participatory right of persons who may by reason of proximity or otherwise assert an interest in the effects of the activity proposed by an applicant on the environment generally or on themselves in particular.*
>
> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis *the consent authority must satisfy itself, first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect.* The apparent comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right. . . . Then, *at the second stage of its consideration, the authority must consider whether there is* ***any*** adverse effect, including any minor effect, which ***may*** affect any person. It can disregard only such adverse effects as will certainly be de minimis, of which the minimal intrusion of the closets into the yard space may be an example, and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, the consent authority must require the applicant to produce a written consent from every person who may be adversely affected. It should not be overlooked also that 'effect' in s 3 includes a temporary effect, which requires the authority to consider adverse effects which may be created by the carrying out of construction work." (Emphasis added.)

[24] When an application is notified, any person who wishes to make a submission about the application can make a written submission or request to be heard in person: generally, see s 96 of the Act. Section 100 of the Act makes

it clear that if a person who has made a submission requests to be heard and does not subsequently advise that he or she does not wish to be heard that a hearing must be held: s 100(b) of the Act.

[25] Any decision of the consent authority on the application must be notified in accordance with s 115 of the Act. A resource consent that has been granted for a non-notified application commences on the date on which the decision on the application is notified under s 114 of the Act: see s 116(1A) of the Act.

[26] Although s 116(1A) of the Act goes on to state that a non-notified application does not commence on the date of the decision if an appeal has been lodged, it is clear from s 120(1) of the Act that, apart from the applicant, only a person who has made a submission on the application or a consent holder (which Mr Videbeck is not) may, in fact, lodge an appeal to the Environment Court. The Act, by not providing for an appeal to the Environment Court against a decision not to notify an application for a relevant resource consent, leaves judicial review of the decision not to notify as the only remedy available to a person who is, or considers himself or herself to be, injuriously affected by that decision. As Professor P A Joseph has said: "Judicial review is an institution of constitutional importance embracing the rule of law, the sovereignty of Parliament and the independence of the judiciary": see Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001), p 726. This Court exercises its judicial review jurisdiction in a supervisory manner to ensure that statutory powers of decision are exercised according to law.

Approach to judicial review of decision made under s 94(2) of the Act

[27] Having regard to the guidance provided by the Court of Appeal in *Bayley*, it is possible to consider the power conferred on consent authorities by s 94(2) of the Act in stages: see para [23] above. I summarise those stages as follows:

(a) First, the consent authority must be satisfied of the two threshold requirements under s 94(2): namely:
   (i) that the adverse effect on the environment of the activity for which consent is sought will be *minor*: s 94(2)(a) of the Act; and
   (ii) written approval has been obtained from *every person whom the consent authority is satisfied may be adversely affected* by the granting of the resource consent *unless* the consent authority considers it is unreasonable in the circumstances to require written approval to be given: s 94(2)(b) of the Act.

(b) Once satisfied of the threshold requirements, the consent authority exercises a discretion whether or not to require notification of the application.

The two threshold requirements are referred to in *Bayley* at p 576. The discretionary aspect is noted in *Bayley* at p 580, where the Court of Appeal said that the words "need not be notified" did not *require* a decision not to notify in the context of s 94(1)(b) of the Act. I hold that the same approach is applicable under s 94(2). In this particular case, it is common ground that Mr Videbeck did not give written approval to the application. The council does not contend that it considered that it was unreasonable to require such consent to be obtained. Rather, the council takes the view that Mr Videbeck was not "adversely affected" by the application for the purposes of s 94(2)(b) of the Act because any adverse effect on Mr Videbeck would be de minimis.

[28] Ms Riddiford, for the council, supported by Mr Keall for Kaitoke, submitted that this Court ought not to interfere with the decision of the consent authority not to notify as, applying what was said by the Court of Appeal in *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537, there was nothing to suggest that the exercise of discretion by the consent authority was so irrational that no consent authority, acting reasonably, could have arrived at the decision.

[29] In referring me to the *Woolworths* case Ms Riddiford highlighted the following matters:

(a) In delivering the judgment of the Court, Richardson P noted, at p 545, that:

> ". . . if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused."

(b) At its highest, the point was put by Lord Diplock, in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at p 410, in a passage adopted by the Court of Appeal in *Woolworths* at p 545:

> "'["Irrationality"] applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.'"

[30] Ms Riddiford also referred me to a number of decisions of this Court which she said had applied the *Woolworths* test in the context of non-notification decisions made under s 94(2) of the Act. She referred me, in particular, to *McAlpine v North Shore City Council* [1999] NZRMA 530 at p 540 per Randerson J; *Barrett v Wellington City Council* [2000] NZRMA 481 at pp 505 – 506 per Chisholm J; and *King v Auckland City Council* [2000] NZRMA 145 at p 160 per Randerson J. Ms Riddiford also cited *Worldwide Leisure Ltd v Symphony Group Ltd* [1995] NZAR 177 at pp 182 – 193 per Cartwright J as support for the approach which she urged upon me although that case was determined prior to the Court of Appeal decisions in both *Woolworths* and *Bayley*.

[31] In contrast, Mr Williams referred me to *Ports of Auckland Ltd v Auckland City Council* [1999] 1 NZLR 601 in which, at pp 605 – 606, in answer to a submission that the *Woolworths* test applied to a non-notification decision made under s 94(1)(c)(ii) of the Act, Baragwanath J said at p 606:

> "In this case I am relieved from considering the outer limits of reasonableness in a sphere beyond the ordinary experience of the Court. There is no dispute between the experts on both sides that a noise level above 35 dBA^{L10} inside a residential property is unacceptable. What is in dispute is whether the conditions imposed by the council are sufficient in law and in practice to maintain that result and thereby remove any substantial grounds for the residents to bring a proceeding in nuisance in this Court or proceedings for an enforcement order by the Environment Court under ss 314 and 319 of the [Act], or resist reasonable proposals by the port company for further development. *While Judges of this Court do not in general claim the specialist qualifications and experience of the Environment Judges appointed under s 250 of the [Act], who have the*

benefit of sitting with Environment Commissioners contributing the qualifications described in s 253, the business of construing documents and of assessing the prospects of success in injunction proceedings is very much the business of the High Court. The present case is towards the opposite end of the spectrum considered by the President in *Wellington City Council v Woolworths*. I prefer therefore to employ the lower-level test applied in *Re Erebus Royal Commission* [1983] NZLR 662 (PC) at p 681, namely whether the decision is 'based upon an evident logical fallacy'. See Walker, 'What's Wrong with Irrationality?' [1995] Public Law at pp 556 and 559 – 561 and reference to the 'hard look' approach employed in the USA in *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at p 66." (Emphasis added.)

[32] There is no doubt that orthodox grounds for judicial review may be considered by me in this case. If the consent authority has failed to take account of relevant factors or has taken into account irrelevant factors the decision may be impugned. Likewise, if the consent authority has made an error of law in its approach to the non-notification decision, judicial review may lie. But, in my view, the *Wednesbury* unreasonableness ground (based on *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at p 230 per Lord Greene MR) as discussed in *Woolworths*, must be applied with care in the context of decisions under s 94(2) of the Act.

[33] In *Bayley v Manukau City Council* the Court of Appeal did not find it necessary to consider whether the decision of the consent authority was unreasonable in a *Wednesbury* sense. Nevertheless, Blanchard J (for the Court) added the following comments at p 580:

> "It suffices to say that [the matters to which the Court referred] have given cause for concern. In this connection *it is worth adding the comment that whilst a balancing exercise of good and bad effects is entirely appropriate when a consent authority comes to make its substantive decision, it is not to be undertaken when non-notification is being considered*, save to the extent that the possibility of an adverse effect can be excluded because the presence of some counterveiling factor eliminates any such concern, for example, extra noise being nullified by additional soundproofing." (Emphasis added.)

[34] Given the scheme and purpose of Part VI of the Act and the way in which s 94(2) of the Act has been interpreted by the Court of Appeal, I am of the view that the following approach should be taken by this Court in determining whether non-notification decisions can, properly, be characterised as "unreasonable" in a *Wednesbury* sense:

(a) First, it is necessary to consider whether there was sufficient information available to the consent authority for it to determine, in accordance with the test set out in *Bayley* (see para [23] above), whether the threshold requirements of s 94(2) have been met. Only if those threshold requirements are met will the consent authority have a discretion whether or not to require the application to be notified.

(b) Secondly, in determining whether the information was sufficient to meet the threshold requirements of s 94(2), the Court must give appropriate weight to the experience and expertise of the relevant decision maker having regard to the information placed before him or

her. But as the issue is one of sufficiency of information, this Court will, no doubt, interfere more readily with a decision of this type than (for example) one made in a quasi-political context by elected representatives who are answerable at the ballot box: cf *Woolworths* in the context of rating.

(c) Thirdly, if this Court is satisfied that there was sufficient information for a consent authority, acting reasonably, to be satisfied that the threshold requirements (as explained in *Bayley*) have been met, *Wednesbury* principles will be applied to the ultimate discretionary decision whether or not to notify the application. Thus, once threshold requirements have been met the Court will need to ask itself whether the decision not to notify was one which no consent authority, acting reasonably, could properly have made.

In subparas (a) and (b) above, I use the term "threshold requirements" in the sense described in para [27] above.

[35] In expressing the test in that way I have borne in mind the extraordinary nature of a non-notification decision. In effect, the consent authority (or its delegate) is making a decision to deny the public (or a particular member of the public) the right to be heard, without giving to them any opportunity to influence that decision. The very nature of the decision requires this Court to be vigilant when exercising its supervisory jurisdiction on review.

[36] I have reread the relevant extracts of the cases cited by Ms Riddiford which have applied the *Woolworths* test in the context of non-notification decisions made under s 94(2) of the Act. Those cases are listed in para [29] above. There is nothing in those cases which, to my mind, is inconsistent with the approach which I have articulated in para [34]. My approach also appears to be consistent with the observations made in *Ports of Auckland* at p 606 and by the Court of Appeal in *Bayley* at p 580: cf paras [31] and [33] above.

[37] I also regard the approach which I have articulated as consistent with the underlying purpose of the Act as set out in s 5. The purpose of the Act is to promote the sustainable management of natural and physical resources: s 5(1) of the Act. Section 5(2)(c) of the Act makes it clear that the term "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while, among other things, avoiding, remedying, or mitigating *any* adverse effects of activities on the environment. The need to avoid, remedy or mitigate *any* adverse effects of activities on the environment emphasises (if further emphasis was required since the Court of Appeal decision in *Bayley*) the high threshold which must be met for a consent authority to permit an application for a discretionary activity to be made without notice or without written approval from every person whom the consent authority is satisfied may be adversely affected by the granting of the resource consent: see s 94(2)(b) of the Act.

What information was available to the consent authority when making its decision?

[38] The council has filed an affidavit from Ms Pillay in opposition to the application for judicial review. Ms Pillay is employed as a planner by the council and is based at the Waiheke area office. She has a Bachelor of Planning degree from the University of Auckland which was completed in October 2001.

[39] Ms Pillay is one of a team of five planners and one senior planner. The senior planner has delegated authority to grant approval to non-notified discretionary activities.

[40] In para 1.3 of her affidavit Ms Pillay says:

> "Mr Richard Osborne was the Senior Planner at the time of application. Mr Osborne left Council on 17 July 2002, prior to the completion of the planner's report. Prior to his departure I worked closely with Mr Osborne and discussed a number of aspects of the application with him. As the current Senior Planner, Ms Wendy Baverstock, did not enter into the position [on] 26 August 2002, my report was forwarded to Ms Michelle Hewitt, Council's Senior Specialist Planner for signing. On 7 August 2002, Ms Hewitt granted approval under delegated authority to the non-notified discretionary resource consent."

There is no evidence before me from Ms Hewitt as to the matters which she took into account in determining the application.

[41] The relevant application for resource consent was received by the council on 24 November 2001. The application was lodged on behalf of Kaitoke by its agent, Mr Blackwood of Phillip K Blackwood Ltd. The application sought to relocate an existing dwelling with a parking deck on to 34 Eden Terrace. The reasons why resource consent was required have been summarised in para [4] above.

[42] In paras [14] – [16] above I referred to the matters which were required to be addressed in the assessment of actual or potential effects of a discretionary activity on the environment by s 88(4)(b) and (5) of the Act and the Fourth Schedule to the Act. The application lodged by Kaitoke addressed those issues in the following way:

(a) It stated that the visual impact of the dwelling was "less [than] minor and in compliance with planning controls".

(b) The application asserted that "this Application constitutes no adverse effects to neighbouring property owners".

(c) In its assessment against the district plan, the application stated:

> "Therefore this application [is] a non-notified discretionary application to be treated as a non-notified application, given that it will have no adverse effects on the environment more than minor."

(d) The application also asserted that the proposal "will have no adverse effect on the amenity of the neighbourhood". In addition it stated that "the proposal will have no detrimental effects or detract from any views in the vicinity".

(e) When addressing the effect on the environment the applicant said:

> "The [effects] on the natural and physical environments from such a development will be no more than minor, and will have no potential adverse effects on any of the neighbouring properties."

[43] Ms Pillay, on receipt of the application, undertook a planning assessment. This document refers to various provisions of the district plan and permits a planner to determine whether there is likely to be compliance with, or infringement against, any particular provision in a district plan.

[44] After completing that planning assessment Ms Pillay made a site visit on 28 November 2001. This visit took approximately 45 minutes. She filled out a checklist form on site to assist her in evaluating any potentially adversely affected parties.

[45] Ms Pillay assessed what experts would need to review the application. She obtained reports from experts dealing with the removal of trees (particularly, generally protected ponga trees) and effluent disposal.

[46] On 30 November 2001 Ms Pillay wrote to Mr Blackwood (Kaitoke's agent) advising him that the application had been sent to experts for review and would not be actioned pending receipt of requested information. That advice was given having regard to the provisions of s 92 of the Act.

[47] On 7 December 2001 advice was received that Kaitoke would need a resource consent to discharge domestic waste water in respect of 34 Eden Terrace. That resource consent had to be sought from the Auckland Regional Council. Mr Blackwood was advised of that by letter dated 11 December 2001 and was also advised that council's decision would be deferred, pursuant to s 91 of the Act, pending a decision from the Auckland Regional Council on the land use consent to do works in close proximity to a water course.

[48] Reports were received from the experts from whom Ms Pillay had sought advice. The Auckland Regional Council consent was granted on 19 July 2002.

[49] Upon receiving the resource consent decision from the Auckland Regional Council Ms Pillay read through the reports. She notes in her affidavit that one of the reports received from an arborist "exceeded the scope of his brief". She goes on to say:

> "The report made reference to loss of visual amenity and dominance which are effects that need to be dealt with by a relevant expert, in this case myself as the reporting planner."

The arborist was asked to amend his report to concentrate on issues regarding the health and safety of the trees being removed, the impact on the remaining trees and recommended conditions of consent. Ms Pillay advised the arborist verbally on 9 April 2002 of those matters after she had consulted with her then supervisor, Mr Osborne. The arborist's final report removed comments about the visual impact of the removal of the trees. Ms Pillay adds in para 3.18 of her affidavit:

> "Whilst I specifically considered the issues identified by [the arborist] I did not agree with him. As an arborist [the named arborist] was not qualified to make this kind of judgment, which is within my area of expertise. My assessment was supported by Mr Osborne."

[50] The Auckland Regional Council granted its consent to the application made to it on 22 July 2002. A copy of the consent granted by the Auckland Regional Council and the planner's report were forwarded to Ms Pillay by the Auckland Regional Council.

[51] Between Ms Pillay's oral communication to the arborist on 9 April 2002 and receipt of the resource consent from the Auckland Regional Council in July 2002, the council received two letters written on behalf of Mr Videbeck. The first letter, dated 17 May 2002, was sent by Mr Videbeck himself. The letter reads as follows:

"As a neighbour of this proposed development I would like to voice the following concerns about the proposed development:

1. The mature Native Trees on the Council property in front of the site will have to be removed to fit the house in. This should be notified to the residents.
2. The proposed house will be only 1.5M from the front boundary whereas all other houses in the street are 4M from the boundary. This should also be notified to the other residents.
3. The proposed site will destroy mature native trees.
4. The nature of the slope on the section and slipperiness of the ground make the relocation of an existing house inherently dangerous both to the environment and also to my property.

For the above reasons I feel that the proposed house relocation should be postponed pending notified consent from local residents."

[52] On 20 May 2002, Ms Pillay responded by letter to Mr Videbeck. She confirmed that a discretionary resource consent was lodged on 23 November 2001 for the construction of a new dwelling. She confirmed that the proposal required consent to infringe the 4 m front yard by 2.5 m and would also require the removal of several generally protected trees. She then said:

"All aspects regarding the removal of generally protected trees on the site have been assessed by [the council's parks officer and an arborist] and have been adequately dealt with through recommended conditions of consent.

The proposal is currently on-hold awaiting consent from Auckland Regional Council. It is considered that the matters raised regarding the nature of the slope will be assessed by the appropriate Regional Council Officer.

All resource consent applications are required to be assessed against the relevant District Plan and the Resource Management Act 1991 [RMA]. *Section 94 of the RMA contains specific provisions, which Council must follow when assessing who should be notified when any resource consent application is received.*

The legislation requires the Council to determine whether or not applications need to be publicly notified or not, and also to determine if written approval is required from any person who may be potentially adversely affected by a proposal. It is significant to note that Council adopts a very cautious and conservative approach when assessing the impact of a proposed development on the adjoining environment. *However, unless you are deemed to be an affected party in terms of the notification process outlined above, then Council is not required to inform/advise you of any development.*" (Emphasis added.)

[53] On 20 June 2002, Mr Williams, on behalf of Mr Videbeck, wrote to Ms Pillay noting that he had been instructed by Mr Videbeck in relation to the proposed development at 34 Eden Terrace. Mr Williams stated that Mr Videbeck had forwarded to him a copy of Ms Pillay's letter to Mr Videbeck of 20 May 2002.

[54] Three matters arise out of Mr Williams' letter to Ms Pillay which I note below:

(a) While stating that he was not privy to all information filed in support of the consent application, Mr Williams expressed the view that "it is readily evident to me from what reports I have seen (including that from [an arborist] dated 10 April 2002) that significant land modification and vegetation clearance is involved". Mr Williams pointed out that there would "obviously" be effects associated with the infringement of the front yard, as well as construction effects and either temporary or permanent visual effects depending on the time for replanted vegetation to establish.

(b) Mr Williams noted that the Court of Appeal had confirmed that unless adverse effects on an adjoining owner are de minimis, or a remote possibility, notification cannot be dispensed with without written approval from the relevant adjoining owner.

(c) Mr Williams stated that Mr Videbeck considered himself to be adversely affected and had concerns with regard to the proposal as set out in his letter of 17 May 2002. Mr Williams confirmed that Mr Videbeck had not provided written approval in terms of s 94(2)(b) of the Act and did not intend to do so.

[55] It appears that there was no further correspondence until 21 August 2002 when a copy of the resource consent and Ms Pillay's s 94 report were received by Mr Williams.

[56] Although not forwarded to Mr Williams until (or shortly before) 21 August 2002, Ms Pillay had submitted an assessment and recommendation under s 94 of the Act as to whether the application should proceed on a non-notified basis. Contemporaneously, pursuant to what Ms Pillay describes as "standard practice", Ms Pillay prepared her assessment on the resource consent application on the basis that her recommendation that it proceed on a non-notified basis would be accepted.

The determination under s 94(2) of the Act

[57] On either 4 August 2002 (a Sunday) or 7 August 2002 (a Wednesday) – it is unclear from the handwritten date, though more likely to have been 7 August 2002 – Ms Pillay submitted her assessment under s 94 of the Act to Ms Hewitt who had delegated authority to make a decision on both notification issues and the substantive application for resource consent. Ms Hewitt signed the foot of the s 94 assessment under the following words:

> "**SECTION 94 DETERMINATION**
> Acting under delegated authority, and for the reasons set out in the above assessment, this application for resource consent shall be non notified."

[58] Ms Hewitt signed the document on 7 August 2002. I have already referred to Ms Pillay's evidence about the way in which the report was submitted to Ms Hewitt for decision: see para [40] above. To reiterate, Ms Pillay's evidence is that she forwarded her report to Ms Hewitt "for signing".

[59] There is no evidence that Ms Hewitt asked any questions of Ms Pillay or considered any material other than the s 94 report. It is necessary to consider Ms Pillay's report as a document designed to contain all relevant information upon which the decision maker would rely to take account of all relevant

considerations before determining whether to make a determination not to notify the application in accordance with s 94(2) of the Act. If Ms Pillay provided incomplete material which meant that Ms Hewitt failed to consider a relevant factor, that would, in my view, vitiate Ms Hewitt's decision.

[60] I take the view that for a decision to be made by Ms Hewitt on the basis of information provided by Ms Pillay, a balanced report was required. A balanced report must alert the decision maker not only to the facts and views formed by the reporter but also to contrary views known to the reporter which the person with decision-making power can then consider. Unless a balanced report is provided a real danger exists that the ability of a consent authority to delegate such decisions to a council official under s 34(4) of the Act could be undermined by a de facto sub-delegation of that power. If a person in the position of Ms Pillay is making judgments in a report (as opposed to providing information on which the decision maker could base a decision) the risk of de facto sub-delegation is higher. I add that there is nothing wrong with judgments being formed and expressed in such a report as long as the contrary position is also mentioned so that the decision maker can assess the competing views and make an independent decision. A de facto sub-delegation would run counter to the express provision of s 34(4)(d) of the Act which expressly prohibits delegation, by a local authority, of its power to delegate.

Does judicial review lie?

[61] The particular points dealt with by Ms Pillay in her report which are criticised by Mr Williams, for Mr Videbeck, relate to views, dominance, noise, visual amenity, privacy and removal of trees. Mr Williams submits that none of those factors could properly be described as de minimis in the sense in which that term is explained by Blanchard J in *Bayley*: see para [23] above. I review Ms Pillay's report with those submissions in mind.

[62] Ms Pillay's report contains an assessment of adverse effects in para 4.1. This assessment seems to follow a standard format. Ms Pillay states that in carrying out that assessment she has had regard to "Section 3 of the Resource Management Act (1991) and the applicant's assessment of effects". It is of interest to note that she does not expressly refer in her report to material provided by Mr Videbeck in relation to that assessment. Neither does she refer to Mr Videbeck as a person who considered himself to be adversely affected by the granting of the resource consent and who had indicated a desire to be heard on the application. In para 4.2 of the report Ms Pillay states unequivocally her view that no persons were considered to be adversely affected.

[63] Dealing in turn with the issues raised by Mr Williams, Ms Pillay:

(a) Refers to the magnitude of effects on views as "nil". That observation is supplemented by a comment that:

> "It is considered that the proposed development will not affect the views of any of the adjacent properties."

(b) Refers to the magnitude of effects on dominance as de minimis. Ms Pillay comments that the relocated dwelling is a single-storey two-bedroom dwelling. She considered the effect of the character and potential dominance of the building de minimis because:

  (i) the abutting neighbours would not be affected by the proposal as the existing topography and proposed trees would screen the dwelling from the proposal;

(ii) other dwellings in the surrounding area are of a similar design/scale; and

(iii) it fitted within the anticipated building envelope.

Ms Pillay therefore concluded that a residential building of that scale and intensity was envisaged. Given that it was within the anticipated building platform she stated it was reasonable to assume that there was an expectation of a dwelling of that nature being located within the proposed area.

(c) Stated that the magnitude of adverse effects from noise was de minimis and also would be wholly within the subject property: that is, Kaitoke's property. Having said that, Ms Pillay stated that there would be some noise from the proposal but she indicated that any effects would be de minimis as the work would be temporary and limited to the construction phase of the development.

(d) Characterised the magnitude of adverse effects on visual amenity as de minimis because the relocated dwelling was not inconsistent with any established design characteristic in the area. She observed that the proposed replacement planting of the site would soften the appearance of the proposed dwelling over time: thus adverse effects of the character of the building in visual amenity were considered to be no greater than de minimis.

(e) In the context of privacy, described the magnitude of adverse effects as de minimis. Ms Pillay regarded the separation between the proposed relocated dwelling and the neighbouring dwellings to be sufficient to ensure that any loss of privacy suffered by adjoining property owners was de minimis. In addition, Ms Pillay referred to the large amount of natural screening between the properties on the side and rear boundaries: she said that reinforced her conclusion that the effect would be de minimis.

(f) Characterised the magnitude of adverse effects on trees and vegetation as de minimis. She referred to reports obtained with regard to the removal of trees and vegetation and concluded that provided the proposed removal of the trees was undertaken by an experienced arborist and the trees were replanted on site, effects would be de minimis.

[64] The assessment with regard to noise has overlooked the definition of the term "effect" in s 3 of the Act as one which includes a temporary effect. The Court of Appeal in *Bayley* at p 576, noted that this required the consent authority to consider adverse effects which may be created by the carrying out of construction work.

[65] From the additional evidence which has been placed before me on the application for judicial review, it is clear that Mr Videbeck expressed an interest in being heard on the application almost three months before Ms Pillay's report was submitted to Ms Hewitt. Nevertheless, there is no reference in Ms Pillay's report to the concerns which were expressed by Mr Videbeck or to the fact that he had indicated a desire to be heard. A planner, preparing a balanced report for someone who has delegated authority to make a decision prohibiting interested persons from participating in the public process contemplated by the Act, should ensure, at least, that the decision maker is apprised of the concerns expressed so that he or she can balance those concerns against other views

expressed by the planner or other council officials or experts. For example, if Mr Videbeck's concerns had been noted expressly in the report, Ms Hewitt may well have spoken to Ms Pillay to explore the extent to which his concerns might be justified.

[66] I am also concerned that Ms Pillay's report does not refer to the fact that an arborist had suggested to her that views might be affected. The evidence of Ms Pillay, to which I have already referred, suggests to me that she (with the support of her supervisor) regarded herself as the one qualified to make that assessment and disregarded the concerns expressed by the arborist in the same way that she disregarded Mr Videbeck's concerns. Again, an independent decision maker may well have been influenced, at least, to make further inquiry had those concerns been noted in the report.

[67] The evidence presented to me from Mr Hogan, a landscape architect with 11 years' postgraduate experience in landscape architecture, suggests that the proposed development on Kaitoke's site would have "an overall moderate visual effect" on Mr Videbeck's property. On the scale of effects used by Mr Hogan's company the expression "moderate" is defined as a medium visual effect and is the third-highest effect on the scale used by that company. The two higher scales are "severe" and "high"; the three lower effects are "low effect", "negligible effect" and "no effect". While an experienced planner, Mr Cook, has contested Mr Hogan's evidence on behalf of the council, the fact that an experienced landscape architect is prepared to say that the visual effect could be as high as "moderate" suggests that Ms Pillay's assessment of "nil" was understated. And, I remind myself that, at this juncture, all Ms Pillay is addressing is whether, in terms of *Bayley*, any adverse effect would certainly be de minimis.

[68] Those observations lead me to the view that the relevant decision maker did not have sufficient information available to her to make an independent and impartial assessment of whether this was a case in which the application should or should not be notified publicly. I confess to being troubled by the consistent use, throughout Ms Pillay's report, of the term "de minimis"; I get the distinct impression that the term has been seized upon by the planner (probably with the encouragement of the council, having regard to the nature of the form used to complete the assessment of adverse effects) to support an opinion that it is unnecessary for an application to be notified. The term should, of course, be used in the sense in which the Court of Appeal intended it to be used in its judgment in *Bayley*. I repeat what was said by Blanchard J on behalf of the Court of Appeal in that case at p 576:

> ". . . [the decision maker] must consider whether there is *any* adverse effect, including any minor effect, which *may* affect any person. It can disregard only such adverse effects as will certainly be de minimis, . . . and those whose occurrence is merely a remote possibility. With no more than that very limited tolerance, [the decision maker] must require the applicant to produce a written consent from every person who may be adversely affected."

[69] For the reasons given in paras [65] – [67] above, I am of the view that Ms Pillay's report failed to put all relevant information before Ms Hewitt with the consequence that the decision maker did not take all relevant material into account. Even if I had been persuaded that Ms Pillay's knowledge should be treated as Ms Hewitt's knowledge (which I am not), I would have held that there was insufficient information for the decision maker to be satisfied that the

relevant threshold requirements of s 94(2) of the Act (see para [34] above) had been met. For those reasons the decision not to notify the applications was flawed and is susceptible to review.

[70] In conclusion, on this topic, I wish to add two comments:

(a) During the course of the hearing I indicated my concern to Ms Riddiford, for the council, as to the lack of any evidence before me to explain what was available to Ms Hewitt when her decision was made. I offered Ms Riddiford the opportunity to apply for leave to file a further affidavit from Ms Hewitt on that issue. Ms Riddiford declined that opportunity. She submitted that the s 94 report and the consideration given to the issues by Ms Pillay was all she needed to provide. She submitted that if I was of the view that additional information should be required that would produce an obligation which was too burdensome for councils to fulfil.

I emphatically reject that submission. Parliament has permitted local authorities to delegate decisions whether or not to notify a resource application. Unless the Court is satisfied that the decision maker to whom that task had been delegated has been able to turn an independent mind to the issues, it cannot be satisfied that a decision has properly been made. Effective "rubber-stamping" of recommendations from council officials not to notify such applications is to be discouraged firmly. In my view, it is for the local authority to determine the appropriate level within its structures at which decisions such as this can be made and to delegate accordingly. De facto delegations will not be permitted by the Court.

I add that I do not think that it is too burdensome on councils for this Court to expect the ultimate decision maker, after receiving a balanced report from a planner, to make such further inquiries as he or she sees fit to ascertain whether the threshold requirements for the exercise of the power not to notify under s 94(2) of the Act have been satisfied. Neither is it too burdensome for evidence of that to be given to the Court when a decision not to notify is challenged in judicial review proceedings.

(b) Ms Pillay appears to have carried out a thorough and conscientious inquiry into the application made by Kaitoke. I wish to make it clear that I am not criticising her ability to do her job. My criticisms are aimed at the process used which, in my view, resulted in the ultimate decision maker not having all relevant information before her on which to make a decision whether or not to notify. Ms Pillay's judgment on the various issues may, or may not, be right. In particular, her judgment on visual issues on which she came into conflict with the arborist may well be right. But, that is beside the point. The purpose of Ms Pillay's report was to provide all relevant information for Ms Hewitt to decide the issues before her. The judgments were not Ms Pillay's to form. While she could express opinions on which Ms Hewitt could have relied she had to present a balanced report outlining the points of difference for decision so that Ms Hewitt could decide, independently, whether or not to make further inquiries. But I wish to emphasise that nothing in this judgment should be taken as a personal criticism of the work conscientiously undertaken by Ms Pillay. It is the process used in this case which I criticise.

Issues of relief

[71] On the issue of relief, the problem with which the Court is faced is whether or not to grant a remedy to Mr Videbeck given that I have found that the determination not to notify the application was flawed. This case raises questions of some difficulty because it is clear that both Mr Videbeck and Kaitoke are innocent parties. Kaitoke will be prejudiced if relief is granted for reasons into which I will go shortly. Mr Videbeck will be prejudiced if I do not grant relief as he will not have an opportunity to be heard on the substantive issue. Irrespective of the decision I make, an innocent party will suffer.

[72] The issues of prejudice which caused Mr Keall to submit that relief should be refused, even if I found that the decision not to notify was flawed, are set out in an affidavit sworn by Mr Pattison, a director of Kaitoke. I summarise the essence of his evidence as follows:

(a) Kaitoke purchased the property at 34 Eden Terrace on 15 November 2001.

(b) Although Mr Videbeck owns the adjoining property at 36 Eden Terrace, he does not live permanently on that property.

(c) The dwelling to be relocated on to the subject site is currently on another property owned by Kaitoke on Waiheke Island. That section is subject to an unconditional agreement for sale and purchase, which, by agreement, now has a possession date of 1 October 2002 and a final settlement date of 22 November 2002. The agreement for sale and purchase has been produced to the Court.

(d) Neither Kaitoke nor Mr Pattison has any other land on Waikehe Island where the dwelling could be permanently relocated if relief is granted and the application for resource consent is required to be heard on a notified basis.

(e) Expenditure of $29,000 has been incurred in consequence of the resource consents by Kaitoke and will be wasted if the project cannot proceed.

[73] Mr Pattison also seeks to make something of the fact that Kaitoke has, throughout, sought to abide by legal requirements whereas, he suggests, there is no resource or building consent for Mr Videbeck's dwelling. Mr Videbeck, in an affidavit in reply, says that the existing dwelling on the property had existing use rights and did not require a building consent at the time it was constructed. Mr Videbeck also says that it is true that he does not live on the site at present. He continues:

> "However, the whole purpose of buying this property was to provide a retreat and in the long-term secure a relatively private and secluded site on which I could enjoy the peace and quiet away from the hassle and bustle of Auckland City. I certainly have intentions to live on the property in the long-term. It is those intentions that are affected by Mr Pattison's development."

[74] Mr Videbeck also says that he has intentions to bring the dwelling on his property up to building consent standard and to apply for a building consent on that basis. Mr Videbeck challenges Mr Pattison's deposition that Kaitoke obtained its building consent and resource consent in a lawful manner and has faithfully abided by the requirements of those consents.

[75] I do not propose to rely on any of the competing evidence between Mr Videbeck and Mr Pattison over whether they have or have not carried out activities on their properties lawfully. It is sufficient for present purposes to state that:

(a) I accept that Mr Videbeck is genuinely concerned about what is being done on Kaitoke's land; and

(b) I accept that Kaitoke has, at all material times, acted in good faith in relation to its application for a resource consent.

[76] I also have before me evidence which demonstrates to my satisfaction that while the adverse effects of the application by Kaitoke on Mr Videbeck could not properly be characterised as de minimis for the purpose of the non-notification determination, the effects are, at their highest, moderate in nature. For example, Mr Videbeck will not be affected substantially by the noise of construction as he does not live at the property at Eden Terrace. As he is considering building a dwelling for himself on his property in the "long-term" it is likely that the effect on views might be mitigated by growth of trees and vegetation in the meantime. In all, I think it was fair for Mr Keall to submit, as he did, that it is very likely that if this application proceeded as a notified application it would, nevertheless, be granted.

[77] Given the obvious prejudice to Kaitoke if it is required to proceed to a notified hearing and is required to find an alternative location for the dwelling meantime, I am of the view that the peculiar circumstances of this case justify refusal of relief. But, I refuse relief on a conditional basis. As Mr Videbeck will not have the ability to make submissions on Kaitoke's application, it would be wrong to require him to meet costs of Kaitoke, whether under his undertaking as to damages or otherwise. Accordingly, my refusal of relief is conditional on Kaitoke not requiring Mr Videbeck to answer to his undertaking as to damages or to meet the cost of removing the ponga trees as contemplated by subpara (c) of my interim orders of 27 August 2002 as set out in para [10] above.

Costs

[78] I have not heard from counsel on the question of costs. Nevertheless, it will be evident from this judgment that I regard both Mr Videbeck and Kaitoke as innocent parties who have been put to unnecessary cost through the use of a flawed process by the council in determining not to notify the application. It may well be appropriate for both Mr Videbeck and Kaitoke to seek costs from the council in respect of this proceeding.

[79] I will need to hear from counsel on costs. I retain an open mind as to how the question of costs should be resolved. I invite counsel to confer in the first instance to see whether the question of costs can be resolved. In that regard it may assist counsel if I indicate a tentative view that costs should be classified on a 2C basis. If costs cannot be resolved by agreement, I establish the following timetable for the resolution of costs:

(a) Any memoranda seeking costs should be filed and served on or before 4 October 2002;

(b) Any memorandum opposing costs should be filed and served on or before 11 October 2002; and

(c) I direct a hearing before me at 3.45 pm on 17 October 2002 at which time I will hear from counsel and determine questions of costs. I do not expect that hearing to take more than 30 minutes. Counsel will be expected to speak to their written memoranda.

Result

[80] For the reasons I have given:

(a) The interim orders made on 27 August 2002 are discharged;

(b) I make a declaration that the determination made by Ms Hewitt under delegated authority on 7 August 2002 that Kaitoke's application for resource consent not be notified was made without regard to all relevant considerations;

(c) I decline to grant relief in favour of Mr Videbeck on the application for judicial review on the condition that Kaitoke neither make any claim against Mr Videbeck pursuant to his undertaking as to damages nor seek to recover the costs of removing ponga trees contemplated by subpara (c) of my interim orders of 27 August 2002. If such a claim is made against Mr Videbeck he may apply to this Court to restore the question of relief for further argument; and

(d) Costs are reserved and are to be dealt with in accordance with the timetable established in para [79]. If costs are agreed in advance of the hearing, a consent memorandum may be filed. If a consent memorandum is filed, I will dispense with an appearance on 17 October 2002.

[81] The consequence of those orders is that the resource consents granted on 7 August 2002 shall be regarded as validly given and, if necessary, a declaration to that effect may also be sealed provided that, when seeking to seal such an order, Kaitoke files in Court an undertaking not to pursue Mr Videbeck either under his undertaking as to damages or in respect of the matters contemplated by subpara (c) of my interim orders set out in para [10] above.

[82] I thank counsel for their assistance.

Interim orders discharged:
declaration that determination not to notify was invalid:
relief declined on conditions.

Solicitors for Mr Videbeck: *Maurice Burney Law Practice* (Auckland).
Solicitors for the council: *Buddle Findlay* (Auckland).
Solicitors for Kaitoke: *Vlatkovich & McGowan* (Auckland).

Reported by: Briar Gordon, *Barrister*