Environment Court of N

Otaraua Hapu v New Zealand Historic Places Trust [2010] NZEnvC 439 (23 December 2010)

Last Updated: 30 January 2011

BEFORE THE ENVIRONMENT COURT

Decision No. [2010J NZEnvC 439

ENV-2009-WLG-000153

IN THE MATTER of an appeal pursuant to section 20 of the

Historic Places Act 1993

BETWEEN OTARAUA HAPU

Appellant

AND NEW ZEALAND HISTORIC PLACES

TRUST POUHERE TAONGA

Respondent

AND PETROCHEM LIMITED

Applicant

Court: Environment Judge B P Dwyer sitting alone under s279 of the Resource Management Act 1991

Heard: In Chambers at Wellington

DECISION TO STRIKE OUT

Decision Issued: 24 DEC **2010**

A: Appeal struck out.
B: Costs reserved.

[1] On 12 June 2009, Donna Eriwata and David Doorbar filed an appeal against a decision of the New Zealand Historic Places Trust (NZHPT) made pursuant to s14 Historic Places Act 1993 (HPA), Ms Eriwata and Mr Doorbar purported to file the appeal on behalf of Otaraua Hapu and I will refer to the Appellant as the Hapu throughout this decision.

[2] NZHPT's decision arose out of an application made by Petrochem Ltd (Petrochem) which wished to establish a second pipeline along the southern side of Bertrand Road, Taranaki, adjacent to the existing Maui pipeline. Works associated with the second pipeline had the potential to modify, damage or destroy any archaeological sites in the vicinity and hence an authority was sought pursuant to s14 HPA.

[3] Pursuant to s20(1)(c) HPA, persons affected by a decision made pursuant to s14 have a right of appeal to this Court. Section 20(4) HPA provides that this Court may confirm, reverse or modify the decision of NZHPT.

[4] The reasons for the appeal are set out in the Hapu's notice of appeal as follows:

1. *The decision (No. 2009/203: Bertrand Road, Tikorangi, Waitara) will not achieve the purposes of the Historic Places Act;*
2. *The failure of the Historic Places Trust to adequately consider:*
    (a) The purposes and principles of the Historic Places Act in relation to the historical and cultural heritage value of the sites subject to the decision (No. 2009/203: Bertrand Road, Tikorangi, Waitara);
    (b) The interests of the Otaraua Hapu, who are directly affected by the decision (No. 2009/203: Bertrand Road, Tikorangi, Waitara); and

(c) *The relationship of the Otaraua Hapu and their culture and*

traditions with their ancestral lands, water, sites, wahi tape and other taonga.

The relief sought by the Hapu was the reversal of NZHPT's decision.

[5] The matter was referred to a Court assisted mediation which took place on 25 February 2010, attended by representatives of the Hapu, NZHPT and Petrochem. The mediation did not resolve the matter but apparently the parties entered into discussions which gave rise to an expectation that the appeal could be resolved, however that was not achieved. The appeal was set down for further mediation on 22 July 2010.
[6] The parties were initially informed that the mediation was to take place sometime during the week of 19 July. The Hapu advised that any day that week other than the Tuesday was acceptable to it. 22 July was the Thursday of that week and notice of the mediation was sent to the parties accordingly. However, the Hapu did not attend the mediation although the Court mediator apparently contacted representatives of the Hapu at various times during the course of the day by telephone. Again, mediation failed to resolve the matter.
[7] In view of the lack of progress in finalising this matter I held a pre-hearing conference at New Plymouth on 6 September 2010 to progress the appeal towards a hearing, Appearances were entered on behalf of the Hapu, NZHPT and Petrochem.
[8] At the pre-hearing conference Petrochem advised that it would call four or five witnesses at the appeal hearing and NZHPT indicated that it would call one witness. Mr Doorbar, who appeared for the Hapu, was uncertain as to the number of witnesses which the Appellant might call but thought that it might be five or six.
[9] During the course of the pre-hearing conference I made directions as to the exchange of evidence. I determined after hearing from the participants at the conference that it was reasonable that the Appellant Hapu ought file its evidence first and serve it on the other parties with evidence in response from the other parties following. I set the following timetable for

exchange of evidence:

- Hapu evidence to be filed and served by 12 November 2010;
- Evidence on behalf of NZHPT and Petrochem to be filed and served by 10 December 2010;
- Evidence in reply by the Hapu to be filed and served by 22 December 2010. I indicated that the proceedings would be set down for hearing in New Plymouth as soon as practicable in 2011. The timetable was confirmed by written minute. [10] On 12 November 2010, being the date which was set for filing an exchange of the Hapu's evidence, the Court received the following document from the Hapu. I set out the contents of the document in full:

Otaraua Hapu has appealed the decision to grant an Authority by the Historic Places Trust because:

We have always requested and required a walkover of the proposed site before a HPT Authority was granted because of the significance of Waahitapu in that vicinity, family members wanted to be assured that the proposed pipeline corridor did not cut across an area where whanau had concerns, and given that the company was vague on exactly where and even if they would lay the pipe, we had relied on the site visit to complete the consultation by allowing the whanau associated with the pipe route to have a direct communication with the company.

In the beginning of the consultation process with Petrochem, a walkover with an Archaeologist was agreed to. This never happened

Petrochem decided that they wanted to have an MOU signed with Otaraua before the site visit could take place, we have always said that the MOU is a separate issue and that we would be happy to address it as soon as the matter of the site visit had taken place.

We consider that the HPT gave their Authority with out consulting properly with us and even though we expressed our concerns verbally and in written form to not allow this to

proceed until after the site visit and although we still had not had the walkover that would have satisfied our processes, it was granted Te Kenehi Taylor is a member of the Historic Places Maori Heritage Council and he granted the Authority, he never contacted us or even had a site visit himself to ascertain the simplicity of this issue.

All we have ever wanted was a walkover of the site with precise indications of where the pipe was to be laid with an Archaeologist and members of the Otaraua whanau.

We hope that this court hearing will provide this site visit with members of the Otaraua whanau in which case we would no longer have an Appeal.

It will be apparent that although the above document might be regarded as a statement of position setting out the Hapu's view on the appeal it is certainly not a statement of evidence to which an evidential response might be given by the other parties to these proceedings. No other statement of evidence was filed.

[11] When I became aware of the contents of the Hapu document I determined to hold a further pre-hearing conference in New Plymouth. This was set down for Tuesday, 14 December 2010.

[12] NZHPT filed a memorandum (dated 9 December 2010) with the Court expressing some frustration at the inability of the parties to resolve the matter and suggested an amending condition to the Authority that it had granted. It ultimately sought to have its attendance at the pre-hearing conference waived on the basis that its position was set out in its memorandum of 9 December.

[13] Petrochem filed a memorandum dated 14 December 2010 (received 13 December 2010) expressing its frustration at the process and contending that it had met the Hapu's requests for precise details of the pipeline placement and for a site visit with an Archaeologist as long ago as January 2009 (it is not necessary for me to determine the accuracy of those

contentions). Petrochem considered that either the Appellant should provide evidence sufficient to support the appeal or the appeal should be struck out.
[14] The pre-hearing conference was to be called in accordance with the hearing notice at New Plymouth , at 9.30am on 14 December 2010, No appearance was

entered for the Hapu. I instructed the Registrar to check the Court precincts to ascertain if anyone was present from the Hapu who may have gone to the wrong courtroom. The Registrar did so and advised me that she was unable to locate anyone within the precincts of the Court from the Hapu. I instructed the Registrar to have the matter recalled at 9.45 am and again there was no attendance from any representative of the Hapu.

[15] Counsel for Petrochem (Mr Missingham) had phoned the Court prior to 9.30am to advise that his plane from Auckland was delayed but that if the pre-hearing conference could be stood down for a suitable period of time he would attend as soon as he was able. In light of the Hapu's failure to appear at the pre-hearing conference I had the Registrar contact Mr Missingham to advise that his attendance was waived.

[16] Part 11 RMA grants various powers to the Environment Court enabling it to manage proceedings before it. Section 279(4) provides:

(4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —

(a) That it is frivolous or vexatious; or
(b) That it discloses no reasonable or relevant case in respect of the proceedings; or
(c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[17] The term *abuse of process* has not been defined in RMA. In a general sense the term refers to any situation where the Court's procedures are misused in some way. I consider that the situation where the Appellant Hapu:

- Failed to attend the reconvened mediation;
- Failed to file evidence in accordance with the Court's direction;
- Failed to attend the pre-hearing conference convened by the Court; constitutes an abuse of the Court's process.

[18] I accordingly determine to strike out the Hapu's appeal and hereby do so. Costs are reserved.

[19] If Petrochem wishes to pursue the issue of costs it should do so and the Hapu respond in accordance with the Court's Consolidated Practice Note 2006.

DATED at Wellington this 23rd day of December 2010B P Dwyer Environment Judge