# *KIRKLAND v DUNEDIN CITY COUNCIL — BC200069008*

New Zealand Unreported Judgments · 31 Paragraphs

High Court of New Zealand

AP194/00

15 November, 21 December 2000

John Hansen and Chisholm JJ

## John Hansen and Chisholm JJ.

**[1]** This is an appeal against a preliminary ruling of the Environment Court that it had no jurisdiction to consider whether or not a s 32 analysis undertaken by Dunedin City Council complied with s 32(l) of the Resource Management Act 1991. A subsidiary issue, namely, whether explanations and reasons recorded in a Proposed Plan are capable of forming part of the s 32 analysis, has also been raised. These issues have not been previously considered by this Court.

**Background**

**[2]** When Dunedin City Council publicly notified its Proposed Plan in 1995 the appellants lodged a submission contending, inter alia, that the Council had failed to comply with s 32(l) of the Act. Their submission sought withdrawal of the Proposed Plan in whole or in part. While some aspects of the appellants' submission were upheld when the Council considered submissions to the Proposed Plan during 1999, the allegation that the Council had failed to comply with s 32(l) was rejected.

**[3]** This led the appellants to refer the s 32(l) issue to the Environment Court pursuant to cl 14 of the First Schedule to the Act. They claimed that there was effectively *no* s 32 analysis and their Reference sought withdrawal of the Proposed Plan or a direction by the Environment Court that the Council complete a "*proper*" s 32 analysis. Although the Reference as originally framed applied to the whole of the Proposed Plan, it was agreed that the Environment Court should confine its attention to three sections of the Plan (the rural, townscape and heritage sections).

**[4]** Pursuant to an Environment Court direction the Council lodged all its s 32 documentation up to notification of its Proposed Plan with the Court. However, since issues concerning the Court's jurisdiction to consider the s 32 matter and to provide the relief sought by the appellants had arisen, the Environment Court decided to consider the jurisdiction matter as a preliminary issue. This appeal arises from its determination of that issue.

**Section 32**

**[5]** Section 32 of the Resource Management Act relevantly provides:

> **Duties to consider alternatives, assess benefits and costs, etc**(l) In achieving the purpose of this Act, before adopting any objective, policy, rule, or other method in relation to any function described in subsection (2), any person described in that subsection shall—
>
> (a) Have regard to—
>
> (i) The extent (if arty) to which any such objective, policy, rule, or other method is necessary in achieving the purpose of this Act; and
>
> (ii) Other means in addition to or in place of such objective, policy, rule, or other method which, under this Act or any other enactment, may be used in achieving the purpose of this Act, including the provision of information, services, or incentives, and the levying of charges (including rates); and
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> (iii) The reasons for and against adopting the proposed objective, policy, rule, or other method and the principal alternative means available, or of taking no action where this Act does not require otherwise; and
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> (b) Carry out an evaluation, which that person is satisfied is appropriate to the circumstances, of the likely benefits and costs of the principal alternative means including, in the case of any rule or other method, the extent to which

it is likely to be effective in achieving the objective or policy and the likely implementation and compliance costs; and

(c) Be satisfied that any such objective, policy, rule, or other method (or any combination thereof)—

(i) Is necessary in achieving the purpose of this Act; and

(ii) Is the most appropriate means of exercising the Junction, having regard to its efficiency and effectiveness relative to other means.

(d) Subsection (1) applies to—

…

(c) Every local authority, in relation to—

(i) The public notification, under clause 5 of the First Schedule, of any proposed regional policy statement or proposed plan or of arty change to a regional policy statement or of any variation:

(ii) Any decision made by the local authority, under clause 10 of the First Schedule, on a proposed regional policy statement or proposed plan or on any change to any regional policy statement or on any variation:

(iii) Any decision made by the local authority under clause 29(4) of the First Schedule on any plan or change requested under clause 21 of that Schedule.

(e) A challenge to any objective, policy, rule, or other method, on the ground that subsection (1) of this section has not been complied with, may be made only in a submission made under

(a) Section 49 or section 50 or either of those sections as applied by section 57; or

(b) The First Schedule.

(f) Every person on whom duties are imposed by subsection (1) shall prepare a record, in such form as that person considers appropriate, of the action taken, and the documentation prepared, by that person in the discharge of those duties.

(g) The record prepared by a local authority under subsection (4) in relation to the discharge by that local authority of the duties imposed on it by subsection (1), in relation to any public notification specified in subsection (2)(c)(i), shall be publicly available in accordance with section 35 as from the time of that public notification.

We have added the underlining to highlight the specific part of the section requiring interpretation. While in broad terms it might be said that the primary issue is whether subs (3) bars the Environment Court from considering whether the Council's s 32 analysis complied with s 32(l) of the Act, for reasons to be discussed we believe that this represents an over simplification.

**Environment Court Decision**

**[6]** Three questions were posed by the Environment Court:

(1) has the Environment Court jurisdiction to find that a section 32 analysis for some policies and rules is so defective as to be invalid?

(2) whether the section 32 analysis is defective?

(3) what is the consequence of the invalidity?

Those questions were approached on the basis that if the answer to the first question was "*No*", then the other two questions might not need to be answered. In the event, the Environment Court only found it necessary to answer the first question.

**[7]** Section 32(3) of the Act was considered by reference to its text, purpose and place within the scheme of the Act. The Court approached the matter on the basis that the phrase in the subsection "*has not been complied with*" includes not just inadequate compliance but also a total failure to comply. It reasoned that the express statement in subs (3) that a challenge to a s 32 analysis could *only* be made in a submission, carried with it the implication that any other challenge to a s 32 analysis, including a challenge by way of Reference to the Environment Court, was banned. Its analysis of the wider scheme of the Act reinforced that view.

**[8]** Six specific indicators as to Parliament's intention were identified and discussed by the Court. In summary

- The word "*only*" in s 32(3) meant what it said: a submission represented the only time a s 32 report made by a local authority could be challenged;
- After hearing submissions a local authority could remedy the non existence of a s 32 analysis for a particular objective, policy or method of implementation in its revised Plan and in that situation it would be unrealistic to permit further challenges;
- If the process referred to in the previous point did not remedy the lack of a s 32 analysis then the Environment Court's decision on a Reference could remedy the omission;
- Parliament had deliberately barred any review of a s 32(l) evaluation (at least by the Environment Court) to avoid encouraging s 32 evaluations that amounted to "*cynical triumphs of form over substance*"—,
- Clogging up the Court system with legalistic formalities was to be avoided so that the Court could concentrate on issues of substance;
- Other provisions of the Act, for example, s310 which expressly limits the power of the Court to make declarations, were consistent with the concept that challenges to a s 32 analysis could only be made in a submission.

**[9]** Having addressed those matters the Court then summarised its conclusions:

> [28] … We hold that questions of non compliance with section 32(1) of the Act cannot be raised in a Reference. Questions of the adequacy of a s 32 analysis may be raised, but their answers always go, if a s 32 analysis is found not to justify the merits of any particular objective, policy or method to some alternative means, not to "strike out" a Council's decision. As the Planning Tribunal pointed out inFoodstuffs a reference to the (then) Tribunal of a provision in a proposed plan under clause 14 of the First Schedule to the RMA is not a reference of the local authority's decision, but of the contested provision itself So the Environment Court will not (usually) be concerned with the (alleged) inadequacy of a s 32 analysis but with the evidence and submissions about the benefits and costs presented directly to the Court at any hearing on the substantive merits
>
> [29] However, as we have said, we go further: we hold that the Environment Court has no jurisdiction under 32 of the RMA to consider whether or not the section 32 analysis provided by the Council complies with section 32(1) of the Act: the inquiry is barred by section 32(3).

Although the Court considered that it was strictly unnecessary for it to go further, it observed that if it was wrong about the effect of s 32(3) and was in fact required to consider the s 32(l) analysis it was highly likely that it would have to refer not only to the report filed in the Court but also to the explanation and reasons stated in the Proposed Plan.

**[10]** It is alleged by the appellants that the Environment Court's decision was wrong in law. This Court is asked to declare specified parts of the Proposed Plan void or alternately to direct the Environment Court to determine whether the Council had complied with s 32 before adopting the disputed provisions of the Proposed Plan.

**Determination**

**[11]** Prior to delivery of the decision under appeal there seems to have been an assumption on the part of the Environment Court (and its predecessor, the Planning Tribunal) that the Reference process enabled a submission challenging a s 32(l) analysis to be pursued to the Environment Court: see, for example, *Ngati Kahu v Tauranga District Council* [1994] NZRMA 481; *Leith v Auckland City Council* [1995] NZRMA 400; *Hodge v Christchurch City Council* [1996] NZRMA 127, and *Boon v Marlborough District Council* [1998] NZRMA 305. However, we agree with the Environment Court that none of those decisions has directly confronted the issue which has arisen in this case and for that reason they can offer little assistance.

**[12]** The Environment Court considered that the decision of a Full Bench of this Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145, while not directly in point, offered compelling support for the view that the only time there could be a challenge to a s 32 report was in a submission. It referred to the following passages on pp 159 and 160:

> … A person making a submission on a plan change instituted by a Minister or local authority can challenge the sufficiency of the s 32 report only in his or her submission on the plan chanse. We give this interpretation in the hope this important Act

> will prove workable for those who must administer it but at the same time preserve the rights of persons affected by a plan change.
>
> In response to the argument that those making submissions should have access to a s 32 report because the Act in s 32(3) clearly envisages their having the right to comment on as 32 report, the answer lies in the interpretation we have given to s 32(3). There is no restriction on the time in which a s 32 report can be challenged on a privately requested plan change; therefore, persons wishing to refer the council's decisions or submissions to the Tribunal can criticise the s 32 report by means of a reference to the Tribunal.
>
> However, the situation is different for those plan changes to which s 32(3) applies; ie plan changes initiated by the local authority itself or requested by a regional authority or another territorial authority or by a Minister. In those situations, the s 32 report would have to be available at the time the plan change is advertised because of the limitation contained in s 32(3) on the right to comment on the adequacy or otherwise of a s 32 report. For scheme changes requested by a Minister or a local authority, such comment may only be made in a submission on the plan chanee…

The underlining was added by the Environment Court to highlight the passages it found to be of particular significance. We note, however, that in the first instance the Planning Tribunal had expressly decided that the referrers were entitled to be heard on their submissions about the Council's alleged failures to comply with s 32(l) (*(1993) 2 NZRMA 497* at p 508) and that on appeal the Full Court did not take issue with that aspect of the Tribunal's decision. Although this might suggest that the Full Court decision in fact supports the appellants' proposition, we keep in mind that s 32(3) has been significantly amended since that appeal was decided. Given those factors we believe it would be unsafe to rely on *Countdown v Dunedin City Council* to justify either interpretation. Thus we approach the matter on the basis that s 32(3) needs to be interpreted without the assistance of previous decisions.

**[13]** Section 32(1) of the Act, which is expressed in mandatory terms, is intended to enhance the decision-making process. Environmental and Resource Management Law (1997) by DAR Williams QC succinctly summarises the situation at p 523 when it observes that the s 32 analysis:

> … requires the regional council or territorial authority to examine what it is doing, why it is doing it, the flow on and wider effects of its policies and rules, and the alternatives to its proposed planning regime and rules.

As the Planning Tribunal said in Foodstuffs at p521:

> … the benefits of such a systematic and rigorous process of decision-making will be evident. Among others, the discipline imposed by performing those duties is calculated to restrain implementation of instruments that may not be soundly conceived or clearly expressed.

The obligation resting on local authorities to comply with the s 32(l) duty is reinforced by s 61(l) and by s 74(l). We also note that s 32(4) and (5) require a record of the action taken and the documentation prepared to be publicly available. To us these provisions indicate an underlying statutory intention that local authorities observe the s 32(l) duty imposed on them. Generally speaking it would seem to be contrary to that intention for non compliance to be condoned.

**[14]** At the same time s 32(3) expressly provides that challenges to any objective, policy, rule or other method on the ground that subs (1) has not been complied with may be made only in a submission under the First Schedule. We agree with the Environment Court that the expression "*has not been complied with*" covers both inadequate compliance and no compliance at all. Subsection (3) must, however, be read in conjunction with the statutory provisions which enable dissatisfied submitters to refer matters to the Environment Court. Clause 14 of the First Schedule provides:

> (1) Any person who made a submission on a proposed … plan may refer to the [Environment Court]
>
> (a) Any provision included in the proposed … plan ….
>
> if that person referred to that provision … in that person's submission on the proposed … plan ….

Under cl 15 the Reference is described as an appeal and the Environment Court is given power to confirm the provision or to direct the local authority to modify or delete it or insert any provision referred to the Court. Section 290(1) provides the Environment Court with the same powers, duties and discretions as the local authority which, as the Court below noted, requires it to consider s 32 when resolving any reference and even to carry out a s 32 analysis. In addition the Environment Court has power under s 293 to provide relief outside that sought in a submission, although as the Court below observed, that power is rarely used.

**[15]** We are unable to read into that statutory framework any jurisdictional impediment to the Environment Court taking the local authority's s 32 analysis into account when considering a Reference provided, of course, that the issue was raised in the submission giving rise to the Reference. Our interpretation is that s 32(3) was intended to prevent challenges being mounted outside the plan formulation, change or review process. In other words, once the time for making a submission has expired, challenges based on non compliance with s 32(l) cannot be launched. For example, any attempt to attack an objective, policy or rule in the context of a resource consent application or an enforcement action would be barred by s 32(3). That subsection might also rule out judicial review outside the timeframe that we have identified, but it is unnecessary for us to decide that point. We are satisfied, however, that s 32(3) was not intended to stop a challenge to a s 32 analysis in its tracks as soon as the Council had issued its decision. If that had been the statutory intention we would have expected the Act to have explicitly stated that the s 32 issue could not form part of a Reference to the Environment Court.

**[16]** To some extent the Environment Court seems to have reached similar conclusions. It acknowledged that questions as to the adequacy of a s 32 analysis *could* be raised before it so long as the answers were directed towards the substantive merits of the provision/s in question. We agree, but would add that there does not appear to be any sound basis for drawing a distinction between that type of situation and a situation where the local authority has completely failed to undertake an analysis. In the latter situation a submitter might legitimately seek to bolster his or her attack on the substantive provision by highlighting the failure of the local authority to carry out a s 32 analysis. While we accept that it is for the Environment Court to decide the weight, if any, to be given to that failure and it is for the Environment Court to control conduct of the hearing, we cannot accept that the Environment Court is entitled to refuse to hear argument on the basis that it does not have jurisdiction.

**[17]** On the other hand, we agree with the Environment Court that it did not have jurisdiction to grant the relief sought in this case, namely, withdrawal of the Proposed Plan (or the relevant sections of the Plan) or a direction to the Council to complete a "proper" s 32 analysis. As the Environment Court observed, it does not have a power of review or power to "strike out" a Council decision. It must rely on the statutory powers conferred on it, expressly or by implication. When reference is made to cl 15 of the First Schedule and ss 290 or 293, it becomes apparent that those powers are not wide enough to authorise the Environment Court to provide the relief sought.

**[18]** The Environment Court reached the conclusion that it had

> …no jurisdiction under s 32 of the RMA to consider whether or not the s 32 analysis provided by the Council complies with s 32(l) of the Act …. (Paragraph [29] of its decision).

If that conclusion was intended to indicate that it had no power to review the Council's decision in a procedural sense, we could not take issue with the Environment Court's view. However, in the overall context of the Court's decision that conclusion is capable of carrying the connotation that the Environment Court has no jurisdiction to consider a challenge to the Council's s 32 analysis because such a challenge is only available during the submission phase and cannot carry through to the Reference phase. For reasons already given we do not consider that that accurately reflects the jurisdiction of the Environment Court.

**[19]** When the Environment Court reached its conclusions it specifically commented on six matters. It is appropriate that we briefly respond to those six matters and we do so in the same order as they appear in para [8] of this decision.

**[20]** First, we agree with the Environment Court that the word "*only*" in s 32(3) does mean what it says in the sense that any challenge must be initiated in a submission under the First Schedule. That does not, however, prevent the submitter from carrying the s 32(l) issue into the Environment Court for the purpose of substantively challenging an objective, policy or rule. Judicial review may also be available, but it is unnecessary for us to determine the scope of that remedy.

**[21]** Secondly, it is true that a local authority may remedy the deficiency in its s 32 analysis after it has heard the submission challenging the analysis. In that situation any attempt to pursue the issue to the Environment Court is likely to be futile. On the other hand, in some situations it may be debatable whether the local authority has actually retrieved the situation. Under those circumstances why should a submitter be deprived of an opportunity to pursue the matter to the Environment Court?

**[22]** Thirdly, it is also true that even if the Council has not remedied the situation the Environment Court can carry out its own analysis and thereby remedy the situation. But again we struggle to see why this should constitute a jurisdictional barrier to the submitter electing to pursue the issue in the Environment Court, although it will be for the Court to determine the weight, if any, to be attributed to the submitter's point that the s 32 analysis has been unsatisfactory or non-existent.

**[23]** Fourthly, we are not convinced by the Environment Court's reasoning that "*triumphs of form over substance*" may result. When the possibility of scrutiny of a local authority's s 32 analysis by the Environment Court is added to the Court's power to award costs against the local authority in appropriate cases, we cannot understand how empty s 32 analyses would be encouraged. We would have thought that the possibility of scrutiny would encourage better decisions.

**[24]** Fifthly, while it is understandable that the Environment Court does not wish to be bogged down with "*legalistic formalities*", a challenge to a s 32 analysis for the purpose of substantively attacking an objective, policy or rule could hardly amount to a legalistic formality. This does not suggest, of course, that the Environment Court is obliged to listen to *procedural* reviews of the Council's s 32 analysis or that the Environment Court is not entitled to cut short that form of attack in appropriate cases.

**[25]** Finally, we believe that s310 of the Act is consistent with the interpretation that we have adopted. Section 310 relevantly provides:

> SCOPE AND EFFECT OF DECLARA TION—
>
> A declaration may declare—
>
> (a) The existence or extent of any Junction, power, right, or duty under this Act, including (but, except as expressly provided, without limitation)—
>
> (i) Any duty imposed by section 32 (other than any duty in relation to a plan or proposed plan or any provision of a plan or proposed plan); and
>
> …

If challenges are to be restricted to submissions in terms of s 32(3) it would have been unrealistic for the legislation to have left the door open so that the restriction imposed by s 32(3) could be circumvented by declarations under s 310.

**[26]** One final issue remains. Was the Environment Court entitled to express its view (recorded in para [9] of this judgment) that if it was required to consider the s 32 analysis it was highly likely that it would refer not only to the "report" filed in the Court but also to the explanation and reasons stated in the Proposed Plan? Bearing in mind that the Court is not measuring the analysis in a narrow procedural sense against the requirements of s 32 but is in fact testing the objective, policy, rule or alternatives under consideration in a much broader substantive context, it must follow that the Court is not confined to the s 32 "report".

**Summary**

**[27]** As part of its determination of the merits of an objective, policy, rule or other method, the Environment Court has jurisdiction to take into account the adequacy or total absence of a s 32 analysis. In undertaking that exercise the Court is entitled to determine the weight to be accorded to that factor. It is undertaking"the analysis for substantive, not procedural, reasons.

**[28]** On the other hand, the Environment Court does not have jurisdiction to declare a provision to be void or invalid by virtue of failure of the local authority to comply with s 32(l). Likewise it does not have power to direct a Council to

withdraw its Plan or any part thereof by reason of the inadequacy or absence of a s 32 analysis. Finally, it does not have power to direct a Council to undertake a s 32 analysis.

**[29]** It is worth repeating the first question posed by the Environment Court:

> Has the Environment Court jurisdiction to find that a s 32 analysis for some policies and rules is so defective as to be invalid?

As framed that question appears to carry connotations of a procedural challenge and to imply that the Court has power to strike out a provision where there has been a defective s 32 analysis. Under those circumstances the negative answer given by the Environment Court was probably inevitable. Obviously the question and answer must be confined to their context. For reasons already given it would be a mistake to interpret them in a way that would suggest that a challenge to an objection, policy or rule based on a defective s 32 analysis cannot be carried through to the Environment Court in the situations already discussed.

**Outcome**

**[30]** This is an appeal and not an application for judicial review. Accordingly we do not have power to declare any of the Plan provisions void, and we decline to do so. We also decline to direct the Environment Court to determine whether the Council had complied with s 32 because that would tend to suggest a *procedural* approach was being adopted. On the other hand, the Environment Court appears to have approached the matter on the basis that it had no jurisdiction to consider the s 32 issue raised by the appellants when considering the substantive merits of the provisions under consideration. Subject to our earlier comments about its power to grant the relief sought, the Environment Court should approach any further consideration of the substantive merits of the Reference on the basis that it has jurisdiction to take into account any inadequacies in the s 32 analysis.

**[31]** The appellants have been partially successful and in the normal course of events would be entitled to costs. If agreement cannot be reached as to quantum counsel may submit memoranda.

**Order**

Orders accordingly.

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Counsel for the respondent: *F B Barton* and *M R Garbett*

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Solicitor for the respondent: *Cauldwells*

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