

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH
I MUA I TE KOOTI TAIAO O AOTEAROA**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an application for orders under
section 279(4) of the Resource
Management Act 1991

BETWEEN **QUEENSTOWN LAKES DISTRICT
COUNCIL**

Applicant

AND **UPPER CLUTHA ENVIRONMENTAL
SOCIETY INCORPORATED**
ENV-2018-CHC-056

**UNIVERSAL DEVELOPMENTS
LIMITED**
ENV-2018-CHC-101

MT CHRISTINA LIMITED
ENV-2018-CHC-103

HALFWAY BAY LANDS LIMITED
ENV-2018-CHC-119

SLOPEHILL PROPERTIES LIMITED
ENV-2018-CHC-129

**CONEBURN PRESERVE HOLDINGS
LIMITED & ORS**
ENV-2018-CHC-137

Respondents (Appellants)
(Continued...)

**MEMORANDUM OF COUNSEL IN SUPPORT OF NOTICE OF MOTION SEEKING ORDERS
STRIKING OUT PARTS OF CERTAIN NOTICES OF APPEAL AND SECTION 274 NOTICES**

3 AUGUST 2018

Queenstown Lakes District Council
Counsel: K L Hockly
10 Gorge Road
Queenstown 9300
Ph: (03) 441 1784
Email: katharine.hockly@qldc.govt.nz

AND

**CONEBURN PRESERVE HOLDINGS
LIMITED & ORS**

(Section 274 party to ENV-2018-CHC-093, ENV-2018-CHC-126 & ENV-2018-CHC-127)

GLENDHU BAY STATION

(Section 274 party to ENV-2018-CHC-056, ENV-2018-CHC-126 & ENV-2018-CHC-127)

MT CHRISTINA LIMITED

(Section 274 party to ENV-2018-CHC-056)

Respondents (Section 274 parties)

MAY IT PLEASE THE COURT

Introduction

1. This memorandum is filed in support of the Notice of Motion by the Applicant, Queenstown Lakes District Council (**Council**), which seeks orders under section 279(4) of the Resource Management Act 1991 (**RMA**) (**Application**).
2. The Application is filed in accordance with paragraph 34(2)(a) of the Court's Minute dated 17 July 2018, which directed that any applications for strike out in respect of Topic 1: A resilient Economy (**Topic 1**) and Topic 2: Rural Landscape (**Topic 2**) must be lodged and served by 3 August 2018.
3. The orders sought relate to certain appeals against the Council's decisions on Stage 1 of the Proposed District Plan (**PDP**), and seek to strike out certain parts of the Notices of Appeal filed by the following persons:
 - 3.1 Upper Clutha Environmental Society Incorporated (**UCESI**) (ENV-2018-CHC-056);
 - 3.2 Universal Developments Limited (ENV-2018-CHC-101);
 - 3.3 Mt Christina Limited (ENV-2018-CHC-103);
 - 3.4 Halfway Bay Lands Limited (ENV-2018-CHC-119);
 - 3.5 Slopehill Properties Limited (ENV-2018-CHC-129); and
 - 3.6 Coneburn Preserve Holdings Limited & Ors (ENV-2018-CHC-137)
(Collectively referred to as the **Appellants**.)
4. The orders sought also relate to the following persons who have lodged notices pursuant to section 274 of the RMA, and seek to strike out parts of those section 274 notices:
 - 4.1 Coneburn Preserve Holdings Limited & Ors;
 - 4.2 Glendhu Bay Trustees Limited; and
 - 4.3 Mt Christina Limited
(Collectively referred to as the **Section 274 Parties**)
5. The Council has reviewed the Notices of Appeal filed by the above-named Appellants and the Section 274 Notices filed by the above mentioned Section 274 Parties, and has identified that:

- 5.1** certain parts of the Notices of Appeal filed by the Appellants, as recorded in Appendix 1 to the Notice of Motion, relate to provisions or matters that were not referred to in an original or further submission on Stage 1 of the PDP by those Appellants;
- 5.2** part of the Notice of Appeal filed by UCESI, as recorded in Appendix 2 to the Notice of Motion, seeks relief that is unrelated to any provision or matter included in, or excluded from, the PDP;
- 5.3** the Section 274 Parties have lodged section 274 notices on the basis that they are persons who made a submission on the subject matter of the associated appeal. However, as addressed in the affidavit by Ian William Bayliss and Appendix 3 to the Notice of Motion, the Section 274 Parties did not make a submission addressing the subject matter of the parts of the appeals that they seek to join.
- 6.** The Council submits that the relief sought by the Appellants, as recorded in Appendices 1 and 2 to the Notice of Motion, lacks the requisite jurisdiction by failing to satisfy clause 14 of Schedule 1 of the RMA and should be struck out by this Court. As such, the Council seeks orders striking out certain parts of these appeals on the basis that they disclose no reasonable or relevant case in respect of the proceedings, amount to an abuse of process and are frivolous or vexatious in the sense that the relief lacks the requisite jurisdiction.
- 7.** The Council further submits that that the Section 274 Notices recorded in **Appendix 3** fail to satisfy section 274(1)(e) of the RMA and the Section 274 Parties have no right to call evidence on the matters raised in their Section 274 Notices. Accordingly, the Council seeks orders striking out the Section 274 Notices recorded in **Appendix 3** on the basis that they disclose no reasonable or relevant case in respect of the proceedings, amount to an abuse of process and are frivolous or vexatious in the sense that the Section 274 Parties lack the requisite jurisdiction.
- 8.** The parts of the Notices of Appeal recorded in Appendices 1 and 2 and the Section 274 Notices recorded in Appendix 3 to the Notice of Motion generally relate to Topic 1 and Topic 2.¹ The Council reserves its position in respect of the parts of the Appellants' appeals and any other Section 274 Notice filed by the Section 274 Parties that do not directly relate to Topics 1 and 2.

¹ As identified in the Court's Minute of 26 July 2018.

9. In accordance with the Court's Minute dated 17 July 2018, any additional applications for strike out will be filed on or before 2 November 2018.

Relevant principles applying to strike out

10. The power to strike out the whole or any part of an appeal is provided by section 279(4) of the RMA. Section 279(4) of the RMA provides:

279 Powers of Environment Judge sitting alone

...

(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.

11. The general principle is that the discretion to strike out proceedings under section 279(4) is used sparingly. However, in *Federated Farmers (Wairarapa Division) v Wellington Regional Council*² the Environment Court held that when the jurisdictional boundaries facing the Court are exceeded then there is no discretion to be exercised 'sparingly.' In such circumstances, an appellant's case ought to be struck out as frivolous or vexatious and as disclosing no reasonable or relevant case.³
12. Further, in *Atkinson v Wellington Regional Council*, the Environment Court held that where relief sought through an appeal on a proposed plan is beyond the Court's jurisdiction to hear, it would be an abuse of process to allow the case to proceed.⁴

2 EnvC C192/99, at [17].

3 Above n2, at [17].

4 W013/99, 29 January 1999 at [16].

Appendices 1 and 2: the Appellants have no standing to seek the relief sought

The relevant principles relating to standing

13. As addressed in the Notice of Motion filed by the Council, the right to appeal against a decision of a local authority made under clause 10 of Schedule 1 of the RMA is provided by clause 14 of Schedule 1 of the RMA. Clause 14 provides:

14 Appeals to Environment Court

(1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—

(a) a provision included in the proposed policy statement or plan; or

(b) a provision that the decision on submissions proposes to include in the policy statement or plan; or

(c) a matter excluded from the proposed policy statement or plan; or

(d) a provision that the decision on submissions proposes to exclude from the policy statement or p

(2) However, a person may appeal under subclause (1) only if the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan.

...

14. Clause 14 creates limitations for appeals against the Council's decisions by:

14.1 allowing appeals by submitters only, and outlining specific circumstances in which an appeal can be made to the Environment Court: *clause 14(1)*; and

14.2 requiring that a person appealing under subclause (1) must have referred to the appealed provision or matter in a submission on Stage 1 of the PDP: *clause 14(2)*. In this way, clause 14(2) operates as a precondition that must be satisfied before an appeal can be lodged.

15. In *Option 5 Incorporated v Marlborough District Council*⁵ the High Court found:

[15] Clause 14 of the First Schedule is designed to limit appeal rights from proposed plans (here a variation). Where the appellant has referred to the matter or provision

⁵ (2009) 16 ELRNZ 1.

in their submissions then they may challenge the Local Authority decision by appeal to the Environment Court but not otherwise...

16. The Environment Court considered the application of clause 14 of Schedule 1 in *Re Vivid Holdings Limited*,⁶ setting out the following three-step test to determine whether an appellant has standing to appeal under clause 14:⁷

(1) Did the appellant make a submission?

(2) Does the reference relate to either:

- (i) a provision included in the proposed plan; or*
- (ii) a provision the local authority's decision proposes to include; or*
- (iii) a matter excluded from the proposed plan; or*
- (iv) a provision which the local authority's decision proposes to exclude?*

(3) If the answer to any of (2) is 'yes', then did the appellant refer to that provision or matter in their submission (bearing in mind this can be a primary submission or a cross-submission)?

17. Citing earlier authority, the Environment Court in *Re Vivid Holdings* accepted that the assessment of whether relief is reasonably and fairly raised in submissions should be approached in a “realistic workable fashion,”⁸ and that this same interpretative principle should apply when assessing the scope of appeals and whether they address clause 14(1) criteria.⁹ The High Court in *Option 5 Incorporated v Marlborough District Council*¹⁰ confirmed that a liberal approach should be taken when interpreting the wording used in submissions, holding that:

[15]...The words “provision or matter” should be given a liberal interpretation, and thus a narrow technical interpretation of the words should be avoided. Commonly citizens affected by proposed planning changes covered by cl 14 will represent themselves when making submissions to their local authority. They will not be familiar with resource management “jargon”. As long as it is clear the submitter has broadly referred to the provision or matter in issue this should be sufficient to give the Court jurisdiction to consider the appeal.

6 [1999] NZRMA 467.

7 [1999] NZRMA 467.

8 At [20], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 and *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408.

9 *Re Vivid Holdings Limited* [1999] NZRMA 467 at [20] citing *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 and *Royal Forest and Bird Protection Society Incorporated v Southland District Court* [1997] NZRMA 408.

10 (2009) 16 ELRNZ 1.

- 18.** The Council submits when applying the principles outlined above, it is clear that:
- 18.1** the Appellants named in Appendix 1 to the Notice of Motion do not have standing under clause 14(2) of Schedule 1 of the RMA to seek the respective relief sought by their Notices of Appeal; and
- 18.2** UCESI does not have standing under clause 14(1) of Schedule 1 of the RMA to seek the relief recorded in Appendix 2, being a request for the Council undertake a study in order to inform a future variation to the PDP.

Appendix 1: The Appellants have no standing to seek the relief sought

- 19.** The Council submits that the relief separately sought by these Appellants, as recorded in Appendix 1 to the Notice of Motion, relates to provisions included in (or excluded from) the PDP that were not referred to the separate original or further submissions made by the respective Appellants on Stage 1 of the PDP.
- 20.** The affidavit filed by Mr Bayliss on behalf of the Council, dated 3 August 2018, addresses the content of the submissions and / or further submissions separately lodged by the Appellants on Stage 1 of the PDP as well as the respective relief sought by those Appellants (as recorded in Appendix 1 to the Notice of Motion). Further, the Council provides specific reasons in Appendix 1 to the Notice of Motion as to why the relevant parts of the Appellant's Notices of Appeal do not satisfy the precondition contained in clause 14(2).
- 21.** In reliance on Mr Bayliss' affidavit and the Council's reasons set out in Appendix 1 to the Notice of Motion, the Council submits that when applying the principles outlined above, it is clear that part 3 of the test set out in *Re Vivid Holdings* has not been satisfied for these specific points of relief.
- 22.** The Council therefore submits that these Appellants do not have standing under clause 14 of Schedule 1 and that the parts of the Notices of Appeal recorded in Appendix 1 to the Notice of Motion should be struck out.

Appendix 2: UCESI does not have standing and the relief is not 'on' the PDP

- 23.** There are two reasons why the Council submits that the UCESI relief recorded in Appendix 2 to the Notice of Motion should be struck out:

- 23.1** The relief sought seeks that the Council carry out a further study in order to inform a future variation to the PDP. As such, it is not on a provision included in, or excluded from, Stage 1 of the PDP and does not satisfy any of the requirements of clause 14(1) of Schedule 1.
- 23.2** The relief sought by UCESI, as recorded in Appendix 2 to the Notice of Motion, is not 'on' Stage 1 of the PDP and therefore falls outside the Court's jurisdiction.¹¹
- 24.** In relation to the first reason advanced, the Council submits that the relief sought does not fit within any of the clause 14(1) criteria. In particular, the Council submits that the relief sought is not on a provision included or excluded from Stage 1 of the PDP or on a matter excluded from Stage 1 of the PDP. The relief sought by UCESI requests that the Council undertake a piece of work that sits outside the PDP, and which relies on a resolution from the Council that would not be made under clause 10 of Schedule 1 of the RMA.
- 25.** In relation to the second reason advanced by the Council, the relief sought by UCESI is not 'on' the PDP and falls outside the Court's jurisdiction. The principle that the Court's jurisdiction is limited to granting relief that is 'on' a plan change has been generally established by case law.¹²
- 26.** The meaning of 'on' a proposed plan was considered by the High Court in *Palmerston North City Council v Motor Machinists Limited*.¹³ The High Court in *Motor Machinists* firmly endorsed the two limb test established by *Clearwater Resort Limited v Christchurch City Council*,¹⁴ which asks:
- 26.1** whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

11 *Palmerston North City Council v Motor Machinists Limited* [2014] NZRMA 519; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

12 *Palmerston North City Council v Motor Machinists Limited* [2014] NZRMA 519; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

13 [2014] NZRMA 519.

14 HC Christchurch AP34/02, 14 March 2003.

- 26.2** whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.
- 27.** The first limb of the *Clearwater* test questions whether a submission (and consequently an appeal) is addressed to the extent to which the PDP changes the pre-existing status quo. In relation to this limb the High Court in *Motor Machinists*¹⁵ held:
- [80]...The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.*
- 28.** The Council submits that the relief sought by UCESI (being a study to inform a variation) fails on the first limb of the *Clearwater* test in that it does not address the change to the pre-existing status quo advanced by Stage 1 of the PDP. It appears that the purpose of conducting further studies to ultimately inform a variation would be to establish an entirely new regulatory regime beyond the scope of the PDP.
- 29.** The Environment Court in *Bluehaven*, referring to the decision of Kos J in *Motor Machinists* stated that the appeal process is not intended as a vehicle to make significant changes to the management regime in a plan where those changes are not already addressed by a plan change.¹⁶ It is submitted that the relief sought by UCESI, to require further studies and then a variation, seeks to do just that. The outcome of a future study is not known. The PDP cannot, therefore, have dealt with it, nor the Council's s 32 evaluation. The very fact that UCESI accept that a variation would be required to achieve the relief that sought is telling that the relief is not 'on' the PDP. It follows that if the relief sought by UCESI fails the first limb of the *Clearwater* test.
- 30.** The Council further submits that there will be a risk that people affected by the relief could be denied an opportunity to participate, therefore failing the second limb of the *Clearwater* test. Given that the relevant part of the UCESI appeal fails both limbs of the *Clearwater* test, the Council submits that the relief is not 'on' the PDP and that the Court does not have the jurisdiction to hear it.

15 [2014] NZRMA 519.

16 *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [26].

31. For the reasons provided above, the Council submits that the relevant part of the UCESI appeal recorded in Appendix 2 to the Notice of Motion does not satisfy clause 14(1) of Schedule 1 and that the Court does not have the jurisdiction to hear it. Accordingly, the Council submits that the proper course is to strike out this part of the relief sought by the UCESI appeal.

Appendix 3: the Section 274 Parties do not have the requisite standing under section 274 of the RMA

32. As addressed in the Notice of Motion filed by the Council, the ability to become a party to any proceeding (including an appeal) is provided by section 274 of the RMA. The relevant aspects of section 274 state:¹⁷

274 Representation at proceedings

(1) The following persons may be a party to any proceedings before the Environment Court:

...

(e) a person who made a submission to which the following apply:

(i) it was made about the subject matter of the proceedings; and

(ii) section 308B(2) and clauses 6(4) and 29(1B) of Schedule 1 were irrelevant to it:

...

(4) A person who becomes a party to the proceedings under this section may appear and call evidence in accordance with subsections (4A) and, if relevant, (4B).

(4A) Evidence must not be called under subsection (4) unless it is on matters within the scope of the appeal, inquiry, or other proceeding.

(4B) However, in the case of a person described in subsection (1)(e) or (f), evidence may be called only if it is both—

(a) within the scope of the appeal, inquiry, or other proceeding; and

(b) on matters arising out of that person's submissions in the previous related proceedings or on any matter on which that person could have appealed.

...

33. Section 274 of the RMA:

33.1 allows persons who made submissions about the subject matter of the relevant proceedings to join: *subsection 274(1)(e)*; and

¹⁷ Noting that none of the section 274 parties claim to be a trade competitor.

33.2 restricts the ability of persons joining under section 274 to call evidence that relates to matters arising out of that person's submission in the previous related proceeding: *subsection 274(4B)*.

34. In *Beasley v Wellington City Council*,¹⁸ the Environment Court stated:

[16] Section 274(4) of the Resource Management Act stipulates that a s274 party can appear and call evidence only on matters within the scope of the appeal. It also stipulates that s274 parties in class (e) who qualify as persons who made submissions, can appear and call evidence only on matters arising out of their submissions and any matter on which they could have appealed.

35. The Council submits when applying the principles outlined above, it is clear that the parties named in Appendix 3 to the Notice of Motion have not made out the requisite standing under section 274(1)(e) to join as a party to the relevant appeals. Further the Section 274 Parties do not have the right to call evidence on the matters raised in their Section 274 Notices.

36. Specifically, each of the Section 274 Notices listed in Appendix 3 to the Notice of Motion has been filed on the basis that the relevant Section 274 Party made a submission on the subject matter of the relevant appeal.

37. For the specific reasons set out in Appendix 3 to the Notice of Motion, the Council submits the submissions made by the Subject 274 Parties do not relate to, or address, the subject matter of the parts of the appeals to which those Section 274 parties now seek to join.

38. The affidavit filed by Mr Bayliss on behalf of the Council, dated 3 August 2018, addresses the content of the submissions and / or further submissions separately lodged by the Section 274 Parties on Stage 1 of the PDP as well as the matters in which the relevant Section 274 Notices express an interest (as recorded in Appendix 3 to the Notice of Motion).

39. On the basis of the above, the Council submits that the proper course is to strike out the Section 274 Notices set out in Appendix 3 of the Notice of Motion.

¹⁸ EnvC W027/06, dated 4 April 2006 at [16]

Proposed timetabling directions

40. Subject to any of the Appellants or Section 274 Parties having a contrary view (which can be recorded in any notice of opposition, as per the timetabling directions proposed below), the Council considers that the Application is appropriate for determination on the papers.¹⁹ In particular, all relevant documents, being the submissions on Stage 1 of the PDP, the Notices of Appeal and the Section 274 Notices, are already before the Court. As such, the Council respectfully seeks such a direction.
41. The Court's Minute dated 17 July 2018 proposed that a case management conference be set down for the week of 3 September 2018. While it would be preferable for all preliminary matters of this nature to be determined before the case management conference, the Council submits that a timetable to provide for this to occur is unlikely to be achievable. Specifically, the Council notes that submitters' evidence for Hearing Stream 15 on Stage 2 of the Council's PDP²⁰ (in respect of which a number of Appellants' and Section 274 Parties' counsel are involved in preparing) is due on 6 August 2018. Further, the Council's full case management memorandum in respect of the Stage 1 appeals is due on 24 August 2018.
42. With the above dates in consideration, the Council respectfully submits that the following timetable directions would be appropriate:
- 42.1 Any notice of opposition by the Appellants and Section 274 Parties (which is to also address the proposal in paragraph 39 of this memorandum) and supporting affidavit(s) to be filed and served by **17 August 2018**;
- 42.2 Any legal submissions by the opposing Appellants and Section 274 Parties to be filed and served by **24 August 2018**; and
- 42.3 The Council's legal submissions in reply and any additional affidavits, to be filed and served by **7 September 2018**.
43. Counsel can be available at short notice for a judicial telephone conference to discuss any aspect of this Application, or the proposed timetable directions.

¹⁹ The Council notes that similar applications were heard on the papers in the context of the appeals on the Auckland Unitary Plan in *J Lenihan and Ors v Auckland Council* [2017] NZEnvC 022, dated 28 February 2017.

²⁰ Which, is to be held from the 3rd until the 28th of September 2019.

Dated this 3rd day of August 2018



K L Hockly
Counsel for Queenstown Lakes
District Council