Decision No. C 204 /2004

04/458R

IN THE MATTER		of the Resource Management Act 1991
AND		
IN THE MATTER		of appeals pursuant to section 120 of the Act
BETWEEN		CENTRAL OTAGO DISTRICT COUNCIL
		(RMA 800/03)
AND		HAWEA COMMUNITY ASSOCIATION
		(RMA 801/03)
AND		QUEENSTOWN LAKES DISTRICT COUNCIL
		(RMA 803/03)
		Appellants
AND		OTAGO REGIONAL COUNCIL
		Respondent
AND		CONTACT ENERGY LIMITED
		Applicant

BEFORE THE ENVIRONMENT COURT
Environment Judge J R Jackson (alone under section 279 of the Act)

Hearing at Christchurch on 30 September 2004 and at Queenstown on 1 December 2004

Appearances:
Mr K G Smith and Mr T P Robinson for Contact Energy Limited
Mr G M Todd for Central Otago District Council, Hawea Community Association and Queenstown Lakes District Council
Mr A J Logan for the Otago Regional Council (abiding the decision of the Court)

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

FOURTH PROCEDURAL DECISION

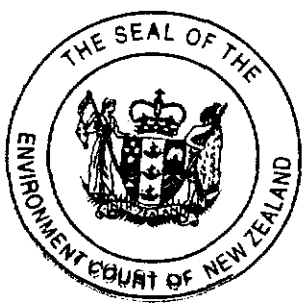
Summary of Contents *Para*

[A] Introduction

[1] The appellants each seek financial contributions of $3,000,000 or more from the applicant in relation to resource consents for the Clutha River issued by the Otago Regional Council. The applicant, Contact Energy Limited (called "Contact") has applied under section 279(4) of the Resource Management Act 1991 ("the Act" or "the RMA") to strike out the passages in the three notices of appeal where the financial contributions are sought.

[2] In summary, the issues to be decided are:

(1) whether the notices of appeal go beyond the submissions they are based on;
(2) whether it is illegal to require a financial contribution to be paid to, or used by, anyone other than a consent authority; and
(3) whether any part of the appeal, if beyond jurisdiction, may be severed, and if so what orders I should make.



[3] The Court decided in the First Procedural Decision[1] – which relates to these and other related appeals – that the law for the purposes of these appeals is the RMA prior to the coming into force of the Resource Management Amendment Act 2003 on 1 August 2003.

Background

[4] The background to the strike-out application is that in 2001 Contact applied to the Otago Regional Council for a number of water and discharge permits in order to continue operation of its three dammed lakes in the Clutha catchment – Lake Hawea, Lake Dunstan and Lake Roxburgh. The Hawea Community Association ("HCA") and the Central Otago District Council ("CODC") made submissions on the applications. The Queenstown Lakes District Council ("QLDC") never made a submission in its own name. Instead the submission now relied on by the QLDC was lodged by the Wanaka Community Board. However, Contact has raised no issue about the QLDC stepping into the Board's shoes.

[5] After a hearing by independent commissioners, the Otago Regional Council issued its decision on about 16 September 2003. Among the appeals lodged in this Court against that decision were three by the appellants as submitters[2]. The first issue raised by Contact is that it claims each of the appeals goes further than its original submission. The second broad issue is that Contact alleges that the financial contributions sought are illegal because they require payment to one of the appellants rather than to the Otago Regional Council.

[6] The submissions by HCA and the Wanaka Community Board both seek relief as follows:

> ...
>
> (k) The consent holder shall pay a financial contribution of $3,000,000.00 (exclusive of Goods and Services Tax). A financial contribution is appropriate in this instance to recognise the ongoing and adverse effects on amenities associated with the proposed activity. In particular it is noted that:

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1 Decision C99/04 under the name *Nut Producers of New Zealand Limited et ors v Otago Regional Council.* Decision C121/04 is identified as the second procedural decision. Decision C167/2004 is the third procedural decision (although not identified as such).

2 Under section 120 of the Act.

(a) Minimal amenity works, grants, or similar financial contributions have been paid by the applicant or its predecessors to the Hawea community over the years, to compensate for the significant adverse environmental effects, loss of amenity, degradation of the foreshore and other adverse effects that the applicant's operations have caused since Lake Hawea was raised.

(b) Erosion and other adverse effects resulting from the raising of the lake and fluctuation of lake and river levels has permanently scarred the landscape and visually impaired the southern shore of the lake and these adverse effects will be ongoing.

(c) Adverse effects resulting from poor management of land and buildings owned by or used by the applicant to facilitate the proposed activity creates a visual eyesore in some localities.

(d) The increased frequency of raising and lowering the lake level over recent years is leaving layers of silt and sedimentation exposed on the shoreline. In northwest wind conditions currents take this sediment to the lake outlet where the intake for the Lake Hawea township water supply is located.

(e) The applicant has acknowledged in its application the permanent significant adverse environmental effects arising from past lake draw downs to extreme low levels – ie below 336 metres. We assert that these effects start to become evidence once the lake level is drawn down below 341 metres.

(f) The applicant is the only major consumer of the natural water resource, yet it pays nothing for such consumption.

(g) The applicant's use of the waters of Lake Hawea and the Hawea River has very significant adverse effects on the landscape and the community in the Hawea area, yet the applicant makes very little financial contribution to the Queenstown Lakes District Council ("QLDC") in the form of Council rates for the freehold land and improvements it owns in the QLDC area ($8709.00 in 1999).

Note: This financial contribution, and income earned from it, will be available for and able to be utilised only by the HCA, for constructing community facilities, improving amenities, enhancing reserves etc. around the shores of Lake Hawea and the Hawea River. It will not be available for use by any other parties that may be adversely affected by the operations of the applicant.

[7] The QLDC and HCA Notices of Appeal are in identical terms in that they each include a request for relief as follows:

3. That a financial contribution of Three Million Dollars ($3,000,000.00) plus Goods and Services Tax be paid to the Appellant or to the Otago Regional Council to be held on behalf of the Appellant and applied to works, projects, schemes or facilities to off-set and

provide compensation to the community of the Appellant for adverse effects caused or contributed to by the activities contemplated by the consents and not otherwise avoided, remedied or mitigated by *conditions* imposed on the grant of consents.

[8] In contrast the CODC's submission increased the stakes by seeking that:

The consent holder shall pay a financial contribution of $5,000,000.00 (exclusive of Goods and Services Tax) to the Central Otago District Council.

Note: a financial contribution is appropriate in this instance to recognise the ongoing and adverse effects on amenities associated with the proposed activity ... The financial contribution paid in terms of this condition could be utilised as a fund to meet the ongoing cost of maintaining lake shore amenities.

[9] The notice of appeal filed by the CODC sought the following relief:

That a financial contribution of Five Million Dollars ($5,000,000.00) plus Goods and Services Tax be paid to the appellant [i.e. to CODC] or to the Otago Regional Council to be held on behalf of the appellant and applied to works, projects, schemes or facilities to offset and provide compensation to the community of the appellant for adverse effects caused or contributed to by the activities contemplated by the contents and not otherwise avoided, remedied or mitigated by conditions imposed on the grant of consents.

The power to require financial contributions

[10] The power to require financial contributions is given in section 108(2)(a) of the Act which states that a resource consent may include:

Subject to subsection (10), a condition requiring that a financial contribution be made.

[11] The power is qualified by subsection (10) which reads[3]:

A consent authority must not include a condition in a resource consent requiring a financial contribution unless –

(a) The condition is imposed in accordance with the purposes specified in the Plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect); and

(b) The level of contribution is determined in the manner described in the Plan.

[3] As it stood prior to the 2003 amendment.

In *Nicoll Management Limited v Manukau City Council*[4] the Principal Environment Judge Sheppard held that the "purposes" specified in a Plan refer to the purposes to which the contributions are to be applied.

[12] It is also important that the use of a financial contribution is controlled by sections 110 and 111 of the Act. These state:

> **110 Refund of money and return of land where activity does not proceed**
>
> (1) Subject to subsection (2), where –
>
> (a) A resource consent includes a condition under section [108(2)(a)] ...; and
>
> (b) That resource consent lapses under section 125 or is cancelled under section 126 or is surrendered under section 138; and
>
> (c) The activity in respect of which the resource consent was granted does not proceed –
>
> The consent authority shall refund or return to the consent holder ... any financial contribution or land set aside under section 108(2)(a) ...
>
> (2) A consent authority may retain any portion of a financial contribution or land referred to in subsection (1) of a value equivalent to the costs incurred by the consent authority in relation to the activity and its discontinuance.
>
> **111 Use of financial contributions**
>
> Where a consent authority has received a cash contribution under section [108(2)(a)] ..., the authority shall deal with that money in [accordance with the requirements of section 223F of the Local Government Act 1974 and in] reasonable accordance with the purposes for which the money was received.

I note that the words in square brackets are now omitted[5] from section 111 as from 1 July 2003 and the amended version is likely to be applicable to any financial contributions received under the conditions requested. I hold that it is implicit from the use of the words "receive" in section 111 and "retain" in section 110 that payment is to be made to the consent authority.

[4] Decision A62/94 at page 18.
[5] Section 262 Local Government Act 2002 (2002 No. 84).

Financial contributions in the Regional Plan

[13] The Otago Regional Council now has an operative regional plan for all water-related issues, called appropriately 'The Regional Plan: Water for Otago'. I will call it simply "the Regional Plan".

[14] The purposes for which a financial contribution may be imposed in the Otago Regional Plan and the method for determining the contribution amount are set out in its section 17(2). Six of its eight sub-paragraphs require consideration. The appellants have disclaimed any reliance on the purposes in the other two (relating to historic/cultural sites and wetlands).

[15] Each of the relevant sub-paragraphs of section 17.2 contains three parts. They describe respectively:

(1) 'circumstances' – Mr Smith described these as roughly equating to the motivation for imposing a financial contribution;

(2) 'purposes' – setting out what any financial contribution will be expended on. In each sub-paragraph the formula begins along these lines[6]:

> To offset the adverse effects of the activity by providing money, land or a combination of both ...; and

(3) the 'method' for determining the contribution amount. This reads:

> The amount of the contribution will be determined having regard to the criteria set out in 17.3 but will reflect the actual costs of works and of providing land sufficient to offset such effects.

[16] For example, section 17.2.1 relates to restrictions on public access to or along lake and river margins. The purpose is stated to be to offset such effects by providing money, land or a combination of both "for alternative legal public access". The method of determining the contribution amount is the actual cost of providing public access "sufficient to offset adverse effects on such access".

[17] The other relevant purposes are as follows:

[6] The actual wording quoted is from para 17.2.1 [Otago Regional Plan: Water p. 247].

- Section 17.2.2 has a purpose of providing public open space or public facilities in an alternative location within the lake or river margin.
- Section 17.2.3 has a purpose of enabling planting, transplanting or maintenance of new or existing vegetation.
- Section 17.2.4 has a purpose of providing for landscaping or planting elsewhere from the site of the activity.
- Section 17.2.5 has a purpose of providing for works which protect the bed or the margin of a lake or river including maintenance and planting of vegetation, such as riparian protection and erosion protection works in the same general locality.

  ...

- Finally, section 17.2.7 has a purpose of providing protection for ecosystem values or habitats beyond the area occupied by or immediately affected by the activity.

[18] A puzzling aspect of the Regional Plan is that most, perhaps even all, of the circumstances where financial contributions may be imposed, are not taxing provisions for Council utilities or services (roads, reserves etc). Rather they are circumstances where direct reliance on section 5(2)(c) – the duty to remedy or mitigate adverse effects – would appear to lead to a similar result in an effort to achieve a net conservation benefit: *Baker Boys Limited v Christchurch City Council*[7]; *Remarkables Park Limited v Queenstown Lakes District Council*[8]. This factor may be relevant at the substantive hearing.

[B] Do the appeals exceed the scope of the related submissions?

[19] A preliminary question that may arise in almost any appeal by a submitter under the RMA is what that submitter sought in their original submission. That is relevant because an appellant cannot enlarge the scope of the proceedings to argue matters which go beyond those signalled in the relevant originating document.

7 [1998] NZRMA 433 at para (61); [1998] 4 ELRNZ 297 at para (61).
8 Decision C161/2003 at [34] to [37].

[20] The submissions[9] by HCA and the QLDC both seek payment of a financial contribution of three million dollars plus GST. They are initially silent as to whom the financial contribution should be paid, but later a "note" explains that the financial contribution will be utilised only by the HCA.

[21] The appeals by the HCA and the QLDC seek relief that the financial contribution be paid to the appellant or to the Otago Regional Council "on behalf of the appellant". Mr Smith's argument is that the notice of appeal extends the relief sought by asking for payment to the appellant or to the Otago Regional Council when that was not requested originally, and thus these parts of the appeals are invalid.

[22] The High Court has stated two principles that are applicable to this question:

(1) that an appeal cannot seek more than the original submission: *Transit New Zealand v Pearson*[10];

(2) that procedures under Part 6 of the RMA should not be bound by undue formality: *Countdown Properties (Northlands Limited v Dunedin City Council*[11]; *Royal Forest and Bird Protection Society Incorporated v Southland District Council*[12].

[23] I doubt if the QLDC and HCA need recourse to the second principle here because their submissions do not state that payment of the financial contributions will be to the HCA. They merely note that the contributions will be utilised by the HCA. Whether that is permissible is the question I decide in part [C] of this decision. Even on a literal interpretation there is no statement in the submissions as to whom the payments are to be made. It must be implicit in the submission that payments are to be made to whomever they may lawfully be paid.

9 Quoted in paragraph [6] above.
10 [2003] NZRMA 318.
11 [1994] NZRMA 145 at 167.
12 [1997] NZRMA 408 at 413.

[24] Do the **appeals** therefore extend the submissions when they request that the financial contributions are to be paid "to the Appellant or the Otago Regional Council"? I have already held that Part 6 of the Act requires that payment of a financial contribution must be to the consent authority. To that extent the relief sought in the notice of appeal that payment should be to the Otago Regional Council is simply a statement of the requirement of the Act, and therefore cannot be beyond jurisdiction.

[25] Contact's complaint is more fairly made of the relief that payment be made in the alternative "to the Appellant". It seems to me that this issue is more clearly analysed under the heading of jurisdiction which is dealt with in the next part of this decision.

[C] Do the appeals request relief beyond jurisdiction?

[26] There are three aspects of the relief sought that Mr Smith, counsel for Contact, argues are beyond jurisdiction: first that payment of financial contributions should be made to the appellant in each case rather than to the consent authority; secondly that even if payment is made to the consent authority it cannot be "on behalf of" a third person or "available for/utilised by" a third person; and finally Contact questions some of the uses proposed for the financial contributions as not being for purposes identified in the Regional Plan.

Can a financial contribution be paid directly to a submitter?

[27] The answer is simply "no". Mr Smith is correct about the first point: it is clear that financial contributions must be paid to the consent authority because it must deal with them in compliance with sections 110 and 111 of the Act[13]. I hold that to the extent that the notices of appeal seek payment to the appellant they exceed jurisdiction. What can be done about that is the subject of part [D] of this decision.

[13] These obligations have not changed under the 2003 amendment to the RMA.

Can a financial contribution be subject to stipulations as to who uses it?

[28] The second question in this part is more difficult – may financial contributions be paid to the consent authority "on behalf of" or with a stipulation that they only be used by a certain person or association? Counsel for Contact attacked this at two levels of generality. First he submitted that the RMA does not provide for compensation for persons affected; secondly he submitted more specifically that the ORP does not provide for payment of financial contributions to particular individuals.

[29] In his first argument, Mr Smith submitted that:

> ... the decision of the (then) Planning Tribunal in *Colonial Homes Limited v Queenstown Lakes District Council*[14] addresses a related point. There the appellant offered to subject itself to a condition of consent fixing compensation payable to the submitter opposing the consent application. The Tribunal expressed the view that the RMA:
>
> > is not designed to place the Planning Tribunal in the role of assessing compensation but rather to prevent adverse effects for the purpose of advancing the concept of sustainable management.

[30] While I accept, for present purposes, that the RMA does not provide for monetary compensation to any party (except possibly to a consent authority as a financial contribution which meets the requirements of the Act) I do not accept that environmental compensation is impermissible. In my view the argument about "compensation" is a semantic one only. The word "compensation" does not occur in the RMA. The term "mitigation" does, and it is clear that mitigation of adverse effects is very important: section 5(2)(c) of the Act. Further, mitigation appears to be the purpose of the Regional Plan's financial contributions.

[31] More directly relevant to Contact's application is that section 111 of the Act states that a consent authority receiving a cash contribution shall deal with that money "in reasonable accordance with the purposes for which it was received". Mr Smith submitted that the fact that Parliament saw the need to provide such assurance for cash contributions paid to the consent authority implies that it was never envisaged that a financial contribution could be paid to any other party. I agree that financial contributions cannot legally be directed to be paid straight to another party. What

[14] Decision W104/95.

happens when they are in a consent authority's hands is up to it, subject to the constraints in section 110 are 111 of the Act.

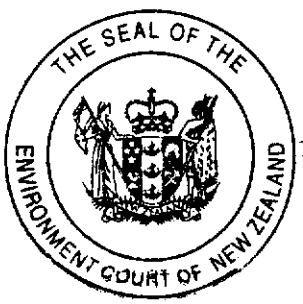
[32] Mr Smith's second, more specific, argument is that financial contributions may only be imposed for a purpose stated in a plan[15]. He then analysed the Regional Plan in an attempt to show that payment "to" or "on behalf of" the HCA or other community was not part of any purpose set out in that plan.

[33] The financial contribution provisions in the Regional Plan identify or, at least, point to "when, why and what" in relation to proposed financial contributions. They do not state for whose benefit the contributions shall be used. It is implicit – again from and subject to sections 110 and 111 of the Act – that a consent authority will use contributions for the benefit of the district and for the purposes stated in the plan, and (preferably) specified in the resource consent. More direction as to payment to, say the HCA, is not required by the rules in the Regional Plan or by the Act; indeed to give more direction is illegal because it would be fettering the Council's discretion. The only possible exception I can think of is if there is a condition that the HCA is responsible for carrying out the work required by the condition and nobody else can (e.g. if the work contemplated is on HCA land so no one else has access). The appeals are far too vague for me to infer that is the case, or that such a condition is contemplated.

[34] I conclude that the words stating for whom financial contributions are to be spent in the Note to each submission and in the relief in the Notice of Appeal are *ultra vires*. I am not asked to take any action in respect of the submissions but I consider the words in the Notice of Appeal which read:

> ... [to be] held on behalf of the Appellant and ...

are illegal.



[15] Section 108(10)(a) of the RMA.

Are the proposed financial contributions for purposes specified in the Regional Plan?

[35] Contact is not concerned only with the question of to whom any financial contributions are paid, but also with what the money is for. It has complained in lengthy memoranda and argument about the lack of particularity of the purpose for which contributions are sought. That issue was the subject of the Second Procedural Decision[16] of the Court as to provision of further particulars about financial contributions, and of previous directions – as to the prior service by these three appellants of their evidence as to financial contributions. Due to the split hearing, and my inadequate notes, I am not sure how far Mr Smith wanted me to decide this issue. For the avoidance of doubt I record my views.

[36] Where the Court has considered there is real strength in Contact's complaints it has attempted to remedy the problem. From other memoranda on the Court file I understand that Contact now has the appellants' evidence on financial contributions so it knows the actual case it has to meet.

[37] With one exception I am reluctant to go further and strike out the relief sought in the notices of appeal for irrelevancy because it seems to me that the relief essentially raises questions of fact which can only be resolved after a hearing as to applicable law and a thorough testing of the facts. I am also conscious that at least in the South Island this is a relatively novel case raising issues as to what are the permitted baselines for existing dam structures and what past effects may be taken into account.

[38] There is one exception. All three appeals contain an unquantified claim for financial contribution for:

> The appellants' costs of involvement in consultation, negotiation and preparation of any management and option plans (including landscaping plans) or flood rules or any monitoring required in any reviews of such conditions of consent[17].

I cannot see how this proposed financial contribution bears any relationship to any of the purposes identified in the Regional Plan. It should be struck out of each appeal.

[16] Decision C121/04.
[17] Paragraph 5 of the CODC notice of appeal, paragraph 4 of the QLDC and HCA notice of appeal.

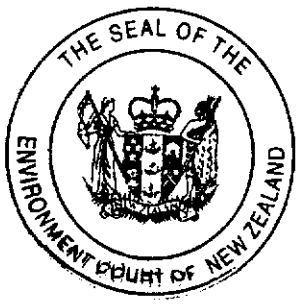
[39] I do not see an incontrovertible case for striking out any more of the notice of appeal so I decline to do so.

[D] Outcome

[40] I have held that parts of the notices of appeal are invalid. Mr Smith submits that is the end of the matter and that the whole of the financial contributions relief sought by the three appellants should be struck out. With respect to Mr Smith, his approach is inconsistent. If one part (the financial contributions) of an appeal can be struck out then why can a smaller part not be struck out – the offending words only?

[41] Mr Smith referred to *Potts v Invercargill City Council*[18]. I have checked this decision. The passage on severance[19] is about severing words in a Council resolution. I doubt therefore if statutory severance cases are of much use except for the obvious point that the primary issue on any suggested severance is whether the words left can "independently survive" – see *Attorney-General for Alberta v Attorney-General for Canada*[20]. How many words (metaphorical fingers, legs, arms) can be lopped off a body (of prose) before it is no longer a body?

[42] That sensible (and obvious) point aside, I consider that any power to sever should come from within the RMA itself. In fact the power comes from the very section on which Contact relies in its application to strike-out. Section 279(4) of the RMA empowers an Environment Judge to order that "the whole or any part of [a] person's case be struck out" (my emphasis) if certain preconditions are met. The statutory authority is plain: part of a notice of appeal can be struck out. If a few words exceed the jurisdiction of the Court to grant, then it is a simple and proper exercise of the Court's jurisdiction to strike them out provided that the words which remain make sense or can be given effect to if, after a hearing, that is the better way of achieving the purpose of sustainable management under the Act.



18 [1985] 1 NZLR 609 (CA).
19 [1985] 1 NZLR 609 at 620.
20 [1947] AC 503, 518.

[43] I direct that under section 279(4) of the RMA the following words are struck out of the relief sought in respect of financial contributions in each Notice of Appeal:

(1) the words "the Appellant or";

(2) the words "... [to be] held on behalf of the Appellant and ...";

(3) para 5 of the relief in the CODC appeal;

(4) para 4 of the relief in the QLDC and HCA appeals.

[44] The remainder of the relief sought in respect of financial contributions in each notice of appeal of course remains extant, although the word 'compensation' should be read as qualified to mean environmental compensation and/or mitigation for the reasons given earlier.

[45] Costs are reserved.

DATED at CHRISTCHURCH 23 December 2004.

J R Jackson
Environment Judge

Issued[21]: 24 DEC 2004

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

[21] Jacksoj/Jud_Rule/D/RMA 800-03.doc.