Sutton v Moule

Court of Appeal
8 September, 22 September 1992
Cooke P, Gault and Thomas JJ

Conditions — Successive applications for consent to same use — Changes made to conditions on second consent — Whether restrictive conditions attached to earlier consent must be deemed to attach to later one — Whether earlier consent could be varied only by application under TCP Act, s 71 — Town and Country Planning Act 1977, ss 71, 74.

Practice and procedure — Application for consent — Scope of application — Circumstances justifying consideration of material in accompanying letter.

Specified departure — Successive applications — Council's power to consider application under section it considers most appropriate.

Moule obtained consent in 1982 to use a building in a Residential zone for real estate offices. The council's consent was subject to a number of unremarkable conditions, but also to two conditions that significantly constrained the use. One restricted the number of persons who might be employed; the other was in effect a ten-year "sunset clause". In June 1987 Moule made a further application, this time for consent to upgrade the building. In a covering letter he made certain references to the existing use of the building. In October 1988 (the delay, as the Court observed, not being explained) the council, after a hearing at which Sutton had argued against such consent being given without inclusion of the sunset clause, granted consent in terms that were generally similar though not identical to those of the earlier consent, save that the sunset clause (and that limiting the number of employees) were not repeated. Sutton, having failed to lodge an appeal within the statutory time limit, applied for a declaration under s 153 as to the permitted use of the land.

Judge Treadwell declared that the permitted use was still restricted by the conditions attached to the earlier consent. On Moule's appeal to the High Court, Tompkins J held that this was wrong: the council had been entitled to treat the second application as a fresh application without being bound to adhere to the conditions imposed on the first consent; and had not been bound to treat it as an application under s 71 and thus consider whether there had been a change of circumstance warranting amendment of the existing conditions.

With the leave of the trial Judge, Sutton brought the present appeal, relying essentially on the points made on the earlier appeal. It was argued, first, that the 1988 consent was beyond the council's powers because it went beyond the scope of Moule's application; and, secondly, that the council was required to consider the second application in terms of the tests in s 71 before granting it under s 74, this involving consideration of whether there had been a change of circumstances warranting deletion of a significant condition.

Held (dismissing the appeal): (1) On comparing the two applications, it was permissible in this case to give weight to the covering letter accompanying the second application, which made it clear that land use was in contemplation as well as upgrading of the building. As a matter of commercial reality, Moule could not have contemplated extensive upgrading of the premises if his use of them was to be restricted by the sunset clause. Moreover, Sutton had been present at the council hearing of the second application and had argued for retention of the sunset clause, so that the council fully understood its significance.

(2) While "[a]ny tendency in such an application to take the land use consent for granted and focus on the restrictions attaching to that consent is to be resisted", this does not mean "that the Act requires s 71 to be invoked every time a later notified application involves a variation or cancellation of a condition". Section 68 allows consent to be granted under any section of the Act, regardless of the section referred to in the application. "This approach does not mean that considerations which are applicable under s 71 will be neglected if the application proceeds under s 74" — the later section generally providing a stiffer hurdle for the applicant. The cases noted below were examples of how these principles had been applied in earlier decisions.

Cases considered

Centrepoint Community Growth Trust v Takapuna City, High Court, Wellington, 9 July 1984 (M 596/83) Casey J

Greta Point Tavern Ltd v Wellington City (1986) 11 NZTPA 332

Mallo Castle Ltd v Waikato County, Decision C 31/85

Pilkington v Secretary of State for the Environment [1974] 1 All ER 283

Wholesale Fish Market (Tauranga) Ltd v Tauranga County, Decision A 38/83, E 807

Note

Section 127(1) of the Resource Management Act 1991 contains a provision broadly similar to that in s 71(1) of the Town and Country Planning Act 1977.

Appeal from a High Court judgment allowing an appeal from a decision of the Planning Tribunal.

B M Grierson for the appellant

P M Salmon QC for the first respondent

N I Porritt for the second respondent (Auckland City Council).

The judgment of the Court was delivered by
THOMAS J.

The issue on appeal

Mr Sutton is Mr Moule's neighbour. Their properties are situated in a residential zone. But Mr Moule has twice obtained planning permission from the Auckland City council to use his property as real estate offices. The council's first planning approval limited the consent to the earliest of ten years, the life of the building, or the real estate business no longer being operated by Mr Moule. The second consent, granted some six years later, omitted this condition.

The issue raised in this appeal is whether Mr Moule's existing use rights which derive from the council's planning approval or approvals are subject to that limitation. Although argument ranged over a number of matters, there are two essential questions which fall to be determined. The first is whether the second consent is beyond the scope of Mr Moule's application and therefore *ultra vires*. The second is whether the council acted correctly in considering the second application and granting the consent under s 74 of the Town and Country Planning Act 1977, which relates to specified departures from a district scheme, rather than s 71 of that Act, which relates to the variation or cancellation of conditions imposed in respect of an earlier consent.

The Town and Country Planning Act was repealed and replaced by the Resource Management Act 1991. The present appeal is continued under the transitional provisions of that Act. Although the Resource Management Act contains sections which are similar to those in issue in this appeal, it need not be referred to again. In this judgment it is convenient to examine the provisions of the Town and Country Planning Act as if they remained the operative provisions.

The background

Mr Moule's property is situated at 162 St Heliers Bay Road in Auckland. For many years he has carried on the business of a real estate agent in these premises. The land at all relevant times was zoned Residential E, and real estate offices, being a commercial use, are neither a permitted nor a conditional use in that zone.

On 22 June 1982, Mr Moule applied to the Auckland City Council for permission to use the building as an office. The application was approved by the council on 18 November 1982. The council's resolution reads:

> That the application to use the whole of a building at 162 St Heliers Bay Road for real estate offices be approved, pursuant to Section 74 of the Town and Country Planning Act 1977 on the grounds that:
> (1) The location of the building on the site and its condition make it inappropriate for residential accommodation.
> (2) The existing arrangement of office uses within the building would provide unsatisfactory residential accommodation.
> (3) Subject to conditions, the office uses in their present form will have little planning significance beyond the site and the provisions of the scheme can remain without change.

This consent is subject to the following conditions:

(a) Compliance with relevant bylaws and the obtaining of the necessary permits.
(b) The existing trees on the boundary of the applicant's site are to be preserved.
(c) The off-street parking area shall be formed, sealed, maintained and marked out on the ground to the satisfaction of the Director of Works.
(d) The availability of off-street parking shall be clearly indicated by signs from both St Heliers Bay Road and Riddell Road to the satisfaction of the Director of Planning & Community Development.
(e) Stormwater drainage of the parking area shall be provided to the satisfaction of the Director of Works.
(f) This consent shall lapse after the expiration of the earliest of the following:
  (i) 10 years, or
  (ii) The life of the building, or
  (iii) The real estate business being no longer operated by the applicant (Mr P M Moule).
(g) No more than 10 persons including the applicant, shall be employed in the business.
(h) This consent is limited to the use of the buildings as a real estate business.
(i) Signs shall be the subject of a separate application.
(j) The site shall be landscaped to the satisfaction of the Director of Planning and Community Development.

On 26 June 1987, Mr Moule applied for consent to "modernise and extend the existing building to provide more suitable accommodation for the existing business". Using the standard form provided by the council for a notified application for planning consent, he stated that the application was necessary because "offices are not a use provided for in the Residential E zone". In an accompanying letter of the same date, Mr Moule made a short supporting submission. He stated that the existing building was impractical for residential use. He observed that the previous conditions attaching to the earlier consent had been complied with and that, although the building had been well-maintained, it now required "extensive refurbishing and structural alterations because of its age". The proposed alterations, Mr Moule said, would result in a much more attractive and functional building. Comment followed on the effect of the proposal on adjoining properties and the lack of commercial space in St Heliers. Finally, reference was made to the previous planning history which could be ascertained from the council's files. Plans attached to the application showed the extent of the alterations to the building.

For reasons which are not clear, the application was not finally dealt with until October 1988. At its meeting on 20 October that year, the council resolved to approve the application. The terms of the resolution substantially followed the council's earlier resolution of 22 June 1982. For the purpose of comparison, however, this consent is also set out in full:

[For reasons of space the later decision is not reproduced in full. The form of the later consent was identical (save for a reference to s 75) to the 1982 one. But the conditions, though similar, were not identical. The following conditions attached to the 1982 consent were repeated in the 1988 consent:

(a), (b), (d), (i) and (j). The remaining conditions did not re-appear in the 1988 consent, which, however, added two new conditions, as follows:

(c) The development being substantially in accordance with the plans submitted;
(e) This consent is limited to the use of the building illustrated on the plans submitted with the application.]

A comparison of the two resolutions reveals that the grounds given by the council for granting the two applications are identical. If it is assumed that the grounds for permitting the departure from the provisions of the council's operative district scheme in 1982 were appropriate, that is to be expected. It is likely that the same grounds would be equally appropriate in 1988.

The conditions, however, are not identical. A number of conditions are omitted from the later consent. Apart from the condition limiting the duration of the consent, the restriction to ten on the number of persons who could be employed in the business is deleted. Two other conditions which are also omitted relate to the formation and maintenance of off-street parking and the provision of stormwater drainage. It appears that these requirements, having been attended to following the original consent, were no longer required. A new condition has been inserted, as condition (c), requiring the development to be substantially in accordance with the plans which Mr Moule submitted to the council, and the consent is limited specifically to the use of the building as illustrated on those plans (condition (e)). Notwithstanding, therefore, the overall similarity of the two consents, it is clear that the council's 1988 resolution was not a mechanical endorsement of the 1982 decision. It goes further than merely deleting the condition in issue.

Mr Sutton, who had objected to the application, intended to appeal against the council's decision. But he failed to file his notice of appeal within the specified time and Mr Moule would not agree to an extension of time. As Mr Moule's neighbour, however, Mr Sutton retains an interest in what happens on Mr Moule's property. Circumstances permitting, he proposes to construct high-quality residential accommodation on his own land.

After taking further advice, Mr Sutton finally sought a declaration to determine the permitted use of the land pursuant to s 153(1) of the Act. But this application was commenced a year after the appeal period had expired. During the intervening time Mr Moule had expended approximately $100,000 on extending and upgrading the building pursuant to the council's approval.

With the consent of the parties, the application under s 153(1) was heard by a Planning Judge, Judge Treadwell, sitting alone. The learned Judge made the following declaration:

> That the first respondent has an existing use protected by s 90(1)(c) of the Town and Country Planning Act 1977 for real estate offices to be carried out within a building at 162 St Heliers Bay Road as such building existed as at 22 June 1982 or as it has been modified pursuant to a council consent in that regard

dated 20 October 1988. The land use is governed by the conditions contained in the consent given by the Planning Committee on 16 November 1982 and is in particular subject to conditions (f) and (g) which read:

(f) This consent shall lapse after the expiration of the earliest of the following:
  (i) 10 years, or
  (ii) the life of a building, or
  (iii) the real estate business being no longer operated by the applicant (Mr P M Moule).

(g) No more than 10 persons, including the applicant, shall be employed in the business.

In effect, the Tribunal held that Mr Moule acquired existing use rights to use the land for real estate offices as a result of the council's June 1982 decision. The use was to be carried out within the building as it existed in June 1982 or as it had been modified pursuant to the council's consent of 20 October 1988. In the learned Judge's view, the conditions attaching to the earlier consent remained applicable.

In reaching this conclusion, Judge Treadwell first held that the council's decision in October 1 1988 was *ultra vires*, at least in part. He correctly pointed out that a council has no jurisdiction to grant a consent which extends beyond the ambit of an application. However, he concluded that the council in this case had gone beyond the scope of the application, in that Mr Moule had only applied for permission to modify the building for the purpose of providing more suitable accommodation for the land use for which he had obtained consent some six years earlier.

In the second place, the learned Judge decided that the conditions imposed in 1982 remained unchanged because Mr Moule's second application had not been considered pursuant to s 71 of the Town and Country Planning Act. Section 71 provides that the owner or occupier of land which is subject to a consent under the Act may apply to the council for the variation or cancellation of any condition, restriction or prohibition imposed in respect of that consent. The grounds are: ". . . that a change in circumstances has caused the condition, restriction, or prohibition to become inappropriate or unnecessary".

Judge Treadwell therefore held that it was not open to Mr Moule to make an application to obtain a superfluous consent to the one which he had already obtained from the council, or to seek to circumvent the requirements of s 71 by having the matter considered afresh under a different section, such as s 74.

Mr Moule duly appealed against the Tribunal's decision. The appeal was heard by Tompkins J. The learned Judge rejected Judge Treadwell's reasoning on both issues. He was not prepared to construe the second application as one which was restricted to the modification of the building, and held that it clearly extended to the use to which the land was to be put. He further held that Mr Moule, as the landowner, was entitled to make successive applications for planning consent, and that the 1988 decision of the council superseded its earlier decision. The 1988 consent was therefore operative and the earlier disputed condition ceased to have effect.

Tompkins J subsequently granted Mr Sutton leave to appeal against his decision.

When the matter was called before us, Mr Porritt appeared for the council, but he at once obtained leave to withdraw. The council abides the decision of this Court.

The two critical issues which have been identified may be now examined in turn.

The vires of the 1988 consent

Mr Grierson, appearing for Mr Sutton, urged us to adopt Judge Treadwell's view that the council's consent in 1982 related to the land use and that the subsequent application in 1988 was restricted to the modification of the structure on the land. Otherwise, he argued, the 1988 consent was *ultra vires* the council in that it would be beyond the scope of Mr Moule's application.

While we accept that the opinion of a Planning Tribunal Judge on such an issue is entitled to considerable respect, we are unable to agree with it. In all the circumstances, it appears to be a somewhat strained interpretation. The application was prepared by Mr Moule himself, no doubt without regard to legal niceties, and the substance or gist of his application is what must count. Judge Treadwell emphasised that Mr Moule's application in 1987 was expressed as an application to modernise and extend an existing *building* to provide more suitable accommodation for Mr Moule's business. But so too, at least as far as it is recorded in the council's letter of 18 November 1982 setting out its consent, did his earlier application. In that letter it is referred to as a proposal to use the whole of the "building" as an office. The difference between using the building for a real estate office and using it for a real estate office to be modernised and extended cannot be of significant moment in determining whether the application relates to the use of the land. Moreover, Mr Moule also stated as the reason why the application was necessary the fact that "offices are not a use provided for in the Residential E zone". This is a clear reference to land use.

Further support for this construction is contained in the letter which Mr Moule wrote and attached to the application. We reject Mr Grierson's suggestion that this letter cannot be examined for the purpose of construing the scope of the application; it is dated the same date as the application, it is attached to the application, and it is expressly referred to at the foot of the application. While it is appreciated that material supporting an application which may change the substance of what has been notified or advertised may not be referred to in order to enlarge the scope of an application, any approach which declined to accept the letter as part of Mr Moule's application in this case would be unduly niggardly. In any event, we entertain no doubt that the letter can be referred to for the purpose of clarifying or amplifying the application.

When this is done, it will be seen that Mr Moule at once reiterated that the "existing building is impractical for residential use . . .". He also advanced a number of reasons why the application should be granted which relate directly to the land use as distinct from the rebuilding proposal. The reference in para (c) of Mr Moule's letter to the shortage of commercial space with adequate off-street parking in St Heliers is an irrefutable example.

In addition, regard must be had to the circumstances which existed at the time Mr Moule made the second application. Mr Moule could not extend the office building without a further application for planning consent. As at the time of his application, five years had elapsed since the previous consent had been granted. Allowing some time for obtaining the further consent and constructing the extension, Mr Moule would have had four or less years in which to use the enlarged and refurbished building before he would lose the use of it altogether, that is, if the time restriction were to remain. Any assumption that Mr Moule was undertaking the alterations and incurring the construction expenses in contemplation of four or less years' enjoyment of the renovated office is self-evidently dubious. Although it had originally been contemplated that the "life of the building" might precede the expiration of ten years, its useful life-span would undoubtedly be extended well beyond that time.

Finally, it is relevant that Mr Moule's application was received and dealt with by the council on the basis that it involved the use of the land for the purpose of a refurbished real estate office beyond the period to which the earlier consent had been limited. The council had no doubt that this was what was proposed. Nor did Mr Sutton. We were told, without dissent from Mr Grierson, that Mr Sutton appeared at the hearing held by the Planning Committee of the council as an objector to the proposal, and presented argument relating to the conditions which he contended should be imposed if the application were to be granted. In particular, he opposed the granting of the application without the same condition limiting the duration of the consent as had been included in the approval given in 1982.

We have therefore concluded that the application made by Mr Moule in June 1987 related in substance and in effect to the use of the land, and that the council was entitled to deal with it on that basis. It follows from this conclusion that the council's consent was not beyond the scope of the application. No question of the council's decision in 1988 being *ultra vires* in this respect therefore arises.

Having reached this view, we do not need to deal with Mr Salmon's alternative submission that the Tribunal, on an application for a declaration pursuant to s 153(1) of the Town and Country Planning Act, lacks jurisdiction to determine the *vires* of the planning approval.

The appropriate procedure

Mr Grierson submitted that it was not open to the council to consider Mr Moule's application in June 1987 pursuant to s 74 without first considering the application under s 71. In considering the application in terms of this section the council would have had to address the question of whether there had been a change in circumstances which had caused the condition to become inappropriate or unnecessary. Mr Grierson described this as a "threshold requirement". Unless the council was satisfied that the criteria for varying or cancelling a condition had been met, he contended, it lacked the jurisdiction to go futher. The council could not consider the matter and grant the application under s 74. Although it was not framed as such, this argument is also one which challenges the *vires* of the council's decision.

Mr Grierson's submission was again based on the reasoning of Judge Treadwell which we have already summarised. One can readily appreciate

the learned Judge's concern. No doubt, s 74 could be abused or exploited so as to enlarge a consent which was deliberately restricted by conditions at the time it was granted. Later applications could be made with the objective of obtaining a more expansive planning approval than that originally granted, or which would be likely to be granted but for the earlier consent. Any tendency in such an application to take the land use consent for granted and focus on the restrictions attaching to that consent is to be resisted. Landowners cannot, having obtained approval to a particular use subject to specified conditions, then seek to erode those conditions by adopting the stratagem of repeating the substantive application. This must be particularly so when the conditions were an integral part of the original approval. In such cases it is entirely appropriate that the applicant should be required to demonstrate that there has been a change in circumstances which has caused the conditions to become inappropriate or unnecessary before they are varied or cancelled.

In *Greta Point Tavern Ltd v Wellington City* (1986) 11 NZTPA 332, Judge Treadwell drew attention to the fact that, once a consent has been granted upon a notified application, s 71 can serve to prevent the "very war of attrition" which is of concern to councils and objectors. Requiring a change of circumstances which renders a condition inappropriate or unnecessary before it is varied or cancelled is therefore of undoubted importance in the scheme of the Act.

We do not consider, however, that the Act requires s 71 to be invoked every time a later notified application involves a variation or cancellation of a condition. Section 71 must be read subject to the provisions of s 68, the relevant part of which may be set out:

> 68. Consent may be granted under an appropriate section — After considering any application the Council may consent to the application under any section of this Act . . . notwithstanding that the application may not have been expressed to have been made or brought under that section . . . .

In our view, it is for the council, subject always to the rights of appeal provided in the Act, to determine which section is applicable in the circumstances of the case before it. When the subject matter of the application is essentially about the continued appropriateness of or necessity for a condition, it will no doubt be appropriate to consider the application under s 71. Where, however, the application generates what is in effect a fresh proposal, it will be preferable to proceed under s 74 and apply the criteria provided in that section. The decision as to which section is appropriate will turn on the circumstances of each case.

This approach is not novel. In *Centrepoint Community Growth Trust v Takapuna City Council*, High Court, Wellington, 9 July 1984 (M 596/83) Casey J held that the disparity between the appellant's proposal to accommodate 322 residents and an existing condition limiting the number of residents to 72 was such that the matter was properly dealt with under s 72 or s 74, and that the Tribunal was justified in not considering it under s 71. Then, *Wholesale Fish Market (Tauranga) Ltd v Tauranga County Council* (DA 38/83, E807, 23 June 1983) is a decision of the Planning Tribunal which confirms that the fact an applicant cannot satisfy the

requirements of s 71 does not preclude it from making an application under s 74. In a thorough and reasoned decision, the Tribunal first declined an application under s 71 on the ground that there had been no change in circumstances which had caused the condition in issue to become inappropriate. After expressly stating that this refusal could not prevent the appellant from making a fresh application, it then considered the matter as if it were an application for a specified departure. Having done so, the Tribunal indicated that it would not grant consent under s 74.

In *Mallo Castle Ltd v Waikato County Council* (C 31/85, 14 June 1985) the Planning Tribunal concluded that it would be unsafe to treat an application to permit the evening dining use of a restaurant, contrary to a condition attached to an earlier consent, as an application pursuant to s 71. The Tribunal observed that the distinction between an application for consent to vary or cancel conditions attaching to an earlier planning consent and an application for a new or different planning consent is sometimes difficult to draw, especially when the conditions are seen as an integral part of the earlier consent and not merely ancillary to it. The better view in that case, the Tribunal thought, was to treat the application before it as being an application for consent to use the site for a similar but, in planning terms, materially different use from that for which consent had already been given (at p 13). The Tribunal's decision provides an illustration of how the relevant planning body is required under the Act to decide which section is appropriate in the circumstances of a particular case.

Both the *Wholesale Fish* case and *Mallo v Waikato County Council* also confirm that second or successive applications can be made under s 74. (See also *Pilkington v Secretary of State for the Environment* [1974] 1 All ER 283, at pp 286-287.) We would be surprised if it were otherwise. Any number of reasons might be given or circumstances might arise which would justify or establish a need for a further application for a departure from the Act. In each case, however, it will be for the council to decide initially which section is appropriate and to grant the application, if it is to be granted, under that section.

This approach does not mean that the considerations which are applicable to an application under s 71 will be neglected if the application proceeds under s 74. On the contrary, the reason why it will be preferable to proceed under that section, and not s 71, will almost inevitably involve a change in circumstances which make the existing approval, including the conditions attaching to it, inappropriate or unnecessary. In most cases, we would imagine, the requirements in s 71 will be implicit in the council's more extensive consideration of the criteria provided in s 74. It is to be noted also that the applicant is unlikely to obtain an advantage in proceeding under that section. Rather than being required to show only that a change in circumstances has caused a condition to become inappropriate or unnecessary, the applicant must meet the more rigorous requirements of s 74 before a specified departure will be granted.

We therefore conclude that Tompkins J was correct in holding that it is permissible to make a second application or successive applications under s 74.

We also agree with Tompkins J that, where a second planning consent has been granted, as in this case, it is a matter of interpretation as to whether that consent merely amends the earlier consent or replaces it in toto. (See

Palmer, *Planning and Development Law in New Zealand*, Vol I, p 347. See also *Pilkington v Secretary of State for the Environment*, supra, at p 286). Once it is accepted that successive applications may be made, this conclusion necessarily follows. Whether the later consent is to be read as a new consent or as one which supplements the earlier consent must depend on the wording which was adopted in granting the consent, having regard to the circumstances of the case.

We entertain no doubt that the council's consent in 1988 was intended to replace the earlier consent. Our reasons have already been indicated when addressing the construction to be placed on Mr Moule's application of June 1987. To those reasons may be added the clear language used by the council in its decision in 1988. The application is approved without reference to the earlier consent, and the reasons for permitting an exception to the scheme are repeated. Conditions which are no longer pertinent to the new approval are dispensed with and conditions which are apposite for the new approval are added. As Tompkins J observed, because it was a new approval the earlier consent and conditions ceased to have effect.

In short, we can find no fault with the procedure which was followed by the council. The use of the land is presently determined by the 1988 consent and the conditions which are incorporated in that decision.

The appeal is therefore dismissed.

Costs to the first respondent on this appeal are fixed at $3,500 together with disbursements including the reasonable travelling and accommodation expenses of counsel as fixed by the Registrar.

Solicitors for the appellant: *B M Grierson* (Auckland)
for the first respondent: *Gellert Ivanson* (Auckland)
for the second respondent: *Simpson Grierson Butler White* (Auckland).