

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA67/2022
[2022] NZCA 206**

BETWEEN	MICHAEL CAMERON BRIAL AND EMILY JANE O'NEIL BRIAL Applicants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent

Court:	Cooper P and Collins J
Counsel:	J G Miles QC, J M G Leckie and B G Frowein for Applicants M G Wakefield and Z T Burton for Respondent P E M Walker and V J Robb for Interested Parties
Judgment: (On the papers)	24 May 2022 at 9 am

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicants must pay the interested parties' costs for a standard application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Cooper P)

[1] Michael and Emily Brial (the applicants) apply for leave to bring a second appeal under s 308 of the Resource Management Act 1991 (the RMA). They allege that a decision of the High Court dismissing an appeal from the Environment Court is affected by errors of law.

[2] Leave to appeal is opposed by S and S Blackler, and Slope Hill Farm Trustee Ltd (the Blacklers) whose application for resource consent for a two-lot subdivision was granted by the Queenstown Lakes District Council (the Council), a grant upheld by the Environment Court.¹ The High Court rejected the Brial's appeal against the Environment Court decision.²

Background

[3] The Blacklers sought resource consent to subdivide land comprising approximately 8.45 ha into two lots of 4.08 and 4.3557 ha respectively, and to cancel a pre-existing consent notice registered against the title preventing additional dwellings from being built on the land. Consent was also sought for earthworks associated with the subdivision. Residential building platforms were identified for each lot, with a defined curtilage area to contain domestic landscaping and structures. Building coverage was to be restricted to 45 per cent of the curtilage area and there was to be a height limitation for buildings of six metres.

[4] It was common ground that the proposal required consent as a discretionary activity under the operative Queenstown Lakes District Plan. The Environment Court noted that the Blacklers' application for resource consent was made prior to the notification of the Council's decisions on a review of the District Plan, which incorporated new provisions for the Wakatipu Basin under which the proposal became a non-complying activity.³ However, since those changes occurred after the application for the proposal was first lodged, under s 88A(1)(b)(ii) and (1A) of the RMA, the status of the application continues to be discretionary.

[5] Under the operative District Plan there was no minimum lot size. However, in the proposed District Plan as altered by the Council's decisions, a minimum lot size of 80 ha was introduced for the Wakatipu Basin Rural Amenity Zone (the Zone), where the land proposed to be subdivided sits. The proposed District Plan introduces a new

¹ *Todd v Queenstown Lakes District Council* [2020] NZEnvC 205 [Environment Court decision].

² *Brial v Queenstown Lakes District Council* [2021] NZHC 3609 [High Court judgment].

³ Environment Court decision, above n 1, at [11], n 24 and [25].

Chapter 24 (Ch 24). The context of the proposed District Plan provisions was addressed by the Environment Court as follows:⁴

[18] By way of background, while the Wakatipu Basin had a Rural zoning and [visual amenity landscape] overlay under the [operative District Plan], it has experienced significant incremental residential subdivision and development over several decades. According to the 24.1 Zone Purpose, Ch 24 seeks to “maintain and enhance the character and amenity of the Wakatipu Basin”. It further explains:

Schedule 24.8 divides the Wakatipu Basin into 23 Landscape Character Units. The Landscape Character Units are a tool to assist identification of the particular landscape character and amenity values sought to be maintained and enhanced. Controls on the location, nature and visual effects of buildings are used to provide a flexible and design led response to those values.

...

While the Rural Amenity Zone does not contain Outstanding Natural Features or Landscapes, it is a distinctive and high amenity value landscape located adjacent to, or nearby to, Outstanding Natural Features and Landscapes. There are no specific setback rules for development adjacent to Outstanding Natural Features or Landscapes. However, all buildings except small farm buildings and subdivision require resource consent to ensure that inappropriate buildings and/or subdivision does not occur adjacent to those features and landscapes.

[19] That purpose is reflected in Obj 24.2.1, as to maintaining or enhancing the landscape character and visual amenity values of the zone. Minimum lot size controls for subdivision are central to that purpose. Those controls include rules in Ch 27 on Subdivision & Development.

[6] Policy 24.2.1.1 in the proposed District Plan is to:

Require an 80 hectare minimum net site area be maintained within the Wakatipu Basin Rural Amenity Zone outside of the Precinct.

The land proposed to be subdivided is outside the Precinct, and so Policy 24.2.1.1 is relevant to the proposed subdivision.

[7] It is relevant also to note the following findings from the Environment Court’s decision:

⁴ Environment Court decision, above n 1.

- (a) The site proposed to be developed is one of many in the area that are already less than 80 ha in area and any subdivision would inherently conflict with Policy 24.2.1.1.⁵
- (b) The relevant subdivision rules designed to achieve Objective 24.2.1, Policy 24.2.1.1 and related objectives and policies include the 80-ha minimum. Thus r 27.6.1 specifies that “[n]o lots to be created by subdivision, including balance lots, shall have a net site area or where specified, an average net site area less than the minimum specified”.⁶
- (c) Another rule stated expressly that a subdivision that did not comply with the 80-ha minimum standard was a non-complying activity.⁷
- (d) Another rule stated further that the construction of more than one residential unit per 80 ha net site area was a non-complying activity.⁸

[8] The Environment Court held that these controls reflect a policy intention to “maintain and enhance the character and amenity of the Wakatipu Basin”.⁹ It considered that the “overall emphasis is on stopping any further decay of those landscape values and, indeed, to achieve some remediation on the status quo”.¹⁰ In the circumstances, the planning witnesses had properly described the proposed District Plan regime as denoting “a significant shift in policy”.¹¹

[9] While these controls did not mean that a subdivision creating lots with a net area of less than 80 ha could not achieve resource consent, the Environment Court considered that it would be necessary to establish the proposal would not have an adverse effect on relevant landscape and rural amenity values in order for consent to be granted. That was because of the requirement in s 104D(1)(a) of the RMA that consent cannot be granted for a non-complying activity unless the adverse effects of

⁵ At [23].

⁶ At [24].

⁷ At [25].

⁸ At [26].

⁹ At [27].

¹⁰ At [27].

¹¹ At [28].

the proposed activity on the environment will be minor.¹² It was implicit in the Court’s reasoning that the requirement of s 104D(1)(b) that activities will not be contrary to the objectives and policies of a relevant proposed plan could not be met. As the Court put it:¹³

Given the clear direction in Pol 24.2.1.1, non-complying subdivisions would generally struggle to satisfy the alternative threshold test in s104D(1)(b), i.e. that the proposed activity would not be contrary to relevant objectives and policies. Pol 24.2.1.1 can be expected to have such influence given its fundamental importance to the design purpose of Ch 24.

[10] The Environment Court’s decision was expressed to be an interim decision. The Court explained that its intention was to deal in the interim decision with allegations that the proposal would have unacceptable effects on landscape values and rural amenity values, and be contrary to related objectives and policies in the planning instruments. It left for a subsequent hearing the consideration of particular impacts the proposal might have more directly on occupiers of neighbouring properties such as the Brians. In adopting that approach, the Court was reflecting procedural arrangements that had been adopted to reflect pressures on court resources as a result of COVID-19 pandemic restrictions.¹⁴

[11] In its interim decision, the Environment Court held that “[g]iven the purpose of Ch 24, the importance of giving its policy intentions in regard to minimum lot sizes is overwhelming”.¹⁵ It appears that words may have been omitted from this passage, and the Court probably meant to refer to the importance of giving *effect to* Ch 24’s policy intentions. The Court observed that although it was possible that appeals against the proposed District Plan provisions might result in its alteration, little would be lost by giving Ch 24 significant weight in the meantime. On the other hand, if the operative District Plan were given greater weight, it would potentially compromise the “fundamental intentions of Ch 24”.¹⁶ The Court continued:¹⁷

For those reasons, we give significant weight to the shift in policy reflected in the [proposed District Plan’s] 80 ha minimum net site area regime. In essence,

¹² At [29]–[30].

¹³ At [32].

¹⁴ At [2].

¹⁵ At [40].

¹⁶ At [40].

¹⁷ At [41].

that means that we fully test the proposal for compatibility or otherwise with all [proposed District Plan] objectives and policies and ascribe contrary [operative District Plan] objectives and policies relatively little weight or influence. In a relative sense, we find that weighting should prefer the policy intentions of the [proposed District Plan] over those of the [operative District Plan].

[12] In accordance with that approach the Court needed to be satisfied that the proposal would protect associated landscape values, maintain the particular landscape character and amenity values of the area, and that granting consent would maintain the integrity of the Ch 24 Zone purpose.¹⁸

[13] For the reasons which it gave, the Court was satisfied the proposal could properly be consented to. That was essentially based on its assessment of the effects of the proposal in terms of landscape character and amenity values. In the summary it gave, in tabulated form towards the end of its decision, the Court recorded a conclusion that the proposal “accords with and assists to achieve” Objective 24.2.1, essentially for that reason.¹⁹ It recognised that the proposal would be in conflict with Policy 24.2.1.1, but held that the conflict was not significant:

[91] The proposal, seeking subdivision of a site already well less than 80 ha in area, inherently cannot accord with Pol 24.2.1.1. However, in the design of Ch 24, as we have discussed, that does not condemn the proposal. Rather, it allows for the proposal to be consented subject to it proving satisfactory in terms of the matters addressed in this interim decision.

[14] On this basis, the Court determined that granting consent would not impact on the integrity of Ch 24, or the proposed District Plan as a whole. This meant the proposal did not pose any precedent risk.²⁰

[15] The principal issue advanced on appeal to the High Court was whether the Court failed to construe and apply Policy 24.2.1.1 in accordance with the requirements established by the decision of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*²¹ and this Court’s decision in *RJ Davidson*

¹⁸ At [41(a)–(c)].

¹⁹ At [90].

²⁰ At [92].

²¹ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

Family Trust v Marlborough District Council.²² The argument advanced was that, properly construed, Policy 24.2.1.1 creates an environmental bottom line. Had the Environment Court paid proper attention to the wording of the Policy, it would have treated it as a prescriptive provision, allowing no discretion or flexibility as to how the Policy should be achieved.

[16] These arguments were rejected by the High Court.²³ Osborne J considered the argument that Policy 24.2.1.1 had not been properly applied was incorrect. He said:

[87] ... once the Court was satisfied the threshold test under s 104D(1)(a) RMA was satisfied, it became a matter for the Court in its consideration of the discretion under s 104 to assess the weight to be given to Policy 24.2.1.1 (when “having regard to it”). Nothing in this step-by-step analysis under the decision-making regime required the Court to treat Policy 24.2.1.1 as a bottom line whereby a failure to meet the requirement constituted a bar to any further consideration of the proposal.

[17] The Brians seek to pursue this issue on appeal to this Court.

[18] The other issue raised in the High Court, and sought to be pursued on further appeal, concerns the way in which the Environment Court dealt with a consent notice which had been issued in 1996 to limit the number of dwellings that could be developed on the land. The Environment Court did not deal with the consent notice and it was argued in the High Court that this resulted in a failure to have regard to the landscape character and amenity values which the consent notice served to protect. It was claimed the Environment Court had simply overlooked the consent notice, and also failed to have regard to the fact that the consent notice was consistent with the policies now contained in the proposed District Plan for the Zone.

[19] The High Court rejected that argument. The Judge considered it was clear the Environment Court had properly understood that the proposal included an application for cancellation of the consent order. It had not been overlooked. Rather, through the directed narrowing of the hearing to “community scale issues”, the Court had effectively deferred the determination of the need to cancel the consent notice to the

²² *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.

²³ High Court judgment, above n 2, at [85]–[90].

final hearing stage. To the extent the proposal (including cancellation of the consent notice) might impact more directly on the Blacklers' neighbours, that was always a matter which would be considered at a further hearing.²⁴

Second appeals under the RMA

[20] We recently summarised the applicable law in respect of applications for leave to bring a second appeal in RMA matters in *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc*.²⁵ In that case, after referring to the relevant statutory provisions in s 308(1) of the RMA and s 303 of the Criminal Procedure Act 2011, we said:

[19] As can be seen, this Court must not give leave for a second appeal unless satisfied that the appeal involves a matter of general or public importance or a miscarriage of justice may have occurred or may occur unless the appeal is heard. As will generally be the case, the miscarriage ground has no relevance here where the context is not criminal.²⁶ Because the appeal is a second appeal, and an appeal to the High Court from the Environment Court is limited to questions of law,²⁷ it is axiomatic that any subsequent appeal to this Court must also be [on a] question of law.

[20] But it is not sufficient simply to state a question of law. The question must be one which is capable of bona fide and serious argument. That was confirmed in the context of resource management appeals by this Court's judgment in *Te Whare O Te Kaitiaka Ngahere Incorporated Society v West Coast Regional Council*.²⁸ So the controlling qualifications for a second appeal are that it involves a question of law capable of bona fide and serious argument, and that it must be of general or public importance.

[21] This summary is sufficient for present purposes.

Discussion

Consent notice

[22] We are satisfied that the proposed appeal against the High Court judgment in respect of the consent notice is not seriously arguable. We agree with the High Court

²⁴ At [138]–[141].

²⁵ *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398.

²⁶ *SKP Inc v Auckland Council* [2020] NZCA 610, (2020) 22 ELRNZ 268 at [25], citing *Tan v Chief Executive of the Ministry of Social Development* [2017] NZCA 369 at [8]–[10].

²⁷ Resource Management Act 1991, s 299(1).

²⁸ *Te Whare o Te Kaitiaka Ngahere Inc Society v West Coast Regional Council* [2015] NZCA 356 at [23].

that the Environment Court was plainly aware of the need to deal with the consent notice and that this was one of the matters intended to be addressed at the further hearing contemplated by that Court. We cannot see any error in the approach taken by the Environment Court in this respect and note that the Court discussed with the parties the two-stage approach to the appeal that it adopted.²⁹ We consider this ground of the proposed appeal does not involve a question of law that is capable of bona fide and serious argument. Nor does it engage a matter of general or public importance; rather, it is related solely to the particular circumstances of this case.

Policy 24.2.1.1

[23] The other ground is advanced on the basis that the particular wording of Policy 24.2.1.1 means that consent should necessarily have been refused to the proposed subdivision, on the basis that the words “[r]equire an 80 hectare minimum net site area” creates an environmental bottom line.

[24] There are formidable difficulties in the way of such a contention. In particular, it is clear that the application required discretionary activity consent. A discretionary activity is by definition one that may be granted consent. Here, as is apparent from the terms of its decision, the Environment Court nevertheless carried out an analysis of the proposal which emphasised its non-complying activity status under the proposed District Plan. And it recognised that, given Objective 24.2.1 and Policy 24.2.1.1, any non-complying subdivision could only meet the threshold tests in s 104D(1) of the RMA if the adverse effects of the activity on the environment would be minor. It took that approach even though s 104D(1) did not formally apply, because under s 88A of the RMA the proposal was to continue to be treated as a discretionary activity.

[25] The provisions of the proposed District Plan were of course relevant under s 104(1) of the RMA, which obliges consent authorities when considering an application for resource consent to “have regard” to, amongst other things, “any relevant provisions of ... a plan or proposed plan”.³⁰ Also of central relevance

²⁹ Environment Court decision, above n 1, at [2].

³⁰ Resource Management Act, s 104(1)(b)(vi).

was the requirement under s 104(1)(a) to consider any actual and potential effects on the environment of allowing the activity.

[26] The Environment Court decision contains a comprehensive assessment of the environmental effects, in particular the effects on landscape values and character, and visual effects. For the reasons it gave as a result of that analysis the Court concluded that the landscape and visual amenity effects of the proposal would be no more than minor, and that the proposal would “properly respect all relevant landscape values and at least maintain landscape and other amenity values”.³¹

[27] Further, the Court concluded the proposal would not have any adverse cumulative effects on landscape and related amenity values. This was because it was a “small sensitively-designed proposal located in an area that ... is capable of absorbing it”.³²

[28] Those factual findings formed the basis of the conclusions the Court then reached in considering the implications of the proposal for the District Plan’s objectives and policies. Relevantly the Court concluded with respect to Objective 24.2.1 that the proposal was in accordance with the Objective and would assist to achieve it. That conclusion must we think be seen in the context of the Court’s earlier discussion of the purpose of the Zone and its associated Objective 24.2.1, which we earlier set out.³³ The Court expressly found that the proposal was in conflict with Policy 24.2.1.1, but concluded the conflict was not significant.³⁴

[29] In respect of the other relevant policies for the Zone, the Court was able to conclude the proposal would either not be in conflict with, or would be in accordance with them and assist in their achievement.³⁵ These included:

³¹ Environment Court decision, above n 1, at [88].

³² At [89].

³³ At [5] above.

³⁴ This conclusion is quoted at [13] above.

³⁵ Environment Court decision, above n 1, at [90].

- (a) Policy 24.2.1.2, which seeks to ensure that subdivision and development is designed to minimise inappropriate modification to the natural land form;
- (b) Policy 24.2.1.3, which seeks to ensure that subdivision and development maintains or enhances landscape character and visual amenity values;
- (c) Policy 24.2.1.4, which seeks to maintain or enhance landscape character and visual amenity values by controlling colour, scale, form, coverage, location and height of buildings and associated infrastructure, as well as vegetation and landscape elements;
- (d) Policy 24.2.1.5, which requires buildings to be located and designed so as not to compromise the landscape and amenity values and natural character; and
- (e) Policy 24.2.1.11, which provides for activities that maintain a sense of spaciousness in which buildings are subservient to natural landscape elements.

[30] These were conclusions the Court reached reasonably based on the evidence. They are not susceptible to appeal on a question of law.

[31] The applicants wish to argue again, on appeal to this Court, that the proposal's failure to comply with the minimum lot size in Policy 24.2.1.1 must have led to the refusal of consent. But we do not consider that to be seriously arguable as a proposition of law. Again, a subdivision such as that proposed was not a prohibited activity.

[32] We therefore do not consider that the minimum lot size established by Policy 24.2.1.1 can appropriately be regarded as an environmental bottom line. Obviously subdivisions can have environmental effects. But if a council does not exercise its powers to prohibit activities, there is always the possibility that a particular

proposal may merit consent when considered against the relevant statutory criteria. That is essentially what the Environment Court found in this case.

[33] Nor do we see the circumstances as at all analogous to those addressed by the Supreme Court in *King Salmon*, in which it was held that the relevant provisions of the New Zealand Coastal Policy Statement (NZCPS) created an environmental bottom line in circumstances where planning authorities were required by the relevant provisions of RMA to “give effect to” the NZCPS.³⁶ That case concerned a proposed plan change, engaging the Council’s obligation under s 67(3) of the RMA to give effect to the NZCPS.

[34] This case arises in a completely different context. As this Court observed in *RJ Davidson Family Trust v Marlborough District Council*:³⁷

There is no equivalent in the resource consent setting to the range of provisions that the Supreme Court was able to refer in the context of the NZCPS, designed to ensure its provisions were implemented: the various matters of obligation discussed above.

[35] Here, the Council’s policies were properly to be considered as a whole, which is what the Environment Court did for the purpose of deciding whether to grant consent to the proposal under s 104. We have already explained the approach taken by the Court which in our view was well open to it.³⁸ The approach amounted to the “fair appraisal of the objectives and policies read as a whole”, referred to by Tipping J in *Dye v Auckland Regional Council*.³⁹

[36] For these reasons, we do not consider that this ground of appeal raises a question of law that is capable of bona fide serious argument.

Result

[37] The application for leave to appeal is declined.

³⁶ *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 21.

³⁷ *RJ Davidson Family Trust v Marlborough District Council*, above n 22, at [70].

³⁸ At [11]–[14] above.

³⁹ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25], affirmed in *RJ Davidson Family Trust v Marlborough District Council*, above n 22, at [73].

[38] The applicants must pay the interested parties' costs for a standard application on a band A basis and usual disbursements.

Solicitors:

Lane Neave, Christchurch for Applicants

Simpson Grierson, Wellington for Respondent

Anderson Lloyd, Dunedin for Interested Parties