BEFORE THE ENVIRONMENT COURT

Decision No: [2016] NZEnvC 37

	ENV-2015-WLG-000095
IN THE MATTER	of an appeal under Clause 14 of the First Schedule of the Resource Management Act 1991
BETWEEN	P PERSICO Appellant
AND	UPPER HUTT CITY COUNCIL Respondent
AND	WALLACEVILLE DEVELOPMENTS LIMITED Applicant

Court: Environment Judge B P Dwyer sitting alone under s279 of the Act

Heard: In Chambers at Wellington

DECISION ON INTERLOCUTORY APPLICATIONS

Decision issued: - 3 MAR 2016

Outcome: Appeal struck out

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

Introduction

[1] On 5 November 2015 Paul Steven Persico (Mr Persico) filed a notice of appeal against a decision of Upper Hutt City Council (the Council) approving Private Plan Change 40 to the Upper Hutt District Plan – Wallaceville (PC40). This decision deals with interlocutory or process matters arising out of that appeal.

Background

[2] The Applicant for PC40 was Wallaceville Developments Limited (Wallaceville) which sought the rezoning of approximately 63ha of land situated at Wallaceville together with a range of consequential amendments to the District Plan to provide for a new suburban development. The site of PC40 largely comprised land previously occupied by the Wallaceville Animal Research Centre which had been used for agricultural research by the New Zealand Government and (in part) for racecourse purposes. PC40 sought to enable development of the site for a combination of Residential and Business Commercial uses.

[3] Mr Persico was a submitter in opposition to PC40. He opposed approval of the plan change in its entirety. Mr Persico's submission was summarised in the following terms in the Council's Summary of Decisions:[1]

- *General (Contamination) – land has been used to bury toxic waste from 1905 – 1992 and there are tens of thousands of highly infected animal carcasses, radioactive materials and cancer causing chemicals buried on the land. Land is still clearly contaminated to the highest level. A toxic waste site unearthed at Wallaceville that was used from 1960 – 1965 contained buried vials, syringes and plastic bags containing animal remains. Important to note that the former Infectious Disease Research Centre were testing for radioactive materials that are buried somewhere on the land. Concerned about the other 55 years of waste buried on the site. Consider past remediation work has not remediated the land to a level acceptable for residential housing. Concern that matters buried in the land include vials, syringes, disease infected carcasses, radioactive*

[1] Commissioners' Recommendation on PC40, Appendix 1.

materials, cancer causing chemicals, anthrax, pulpy kidney, footrot, facial eczema, rye grass staggers, staggers, mastitis, sterility and contagious abortion, brucellosis and tuberculosis, swine fever, fowl pox, black leg, johne's disease, and unknown diseases. Notes that the first case of leprosy in New Zealand was recorded at Wallaceville. Consider housing development will seriously damage Upper Hutt's reputation as a nice safe clean green environment for families to line in (sic).

- *General (Safety) – Note that site is located near a maximum security prison and a large open air rifle range used by the military and two rifle clubs. Considers there is a high probability that a child or children will be killed by a high-powered rifle at the neighbouring rifle range.*

The submission was rejected by the Council's hearing panel, hence this appeal which mirrored the issues raised in Mr Persico's submission albeit in summarised form.

[4] On 30 November 2015 Wallaceville filed an application for partial strikeout of the appeal. It also indicated that an order for security for costs might be sought. By way of minute dated 11 December 2015 the Court advised that it would hear the partial strikeout application at a judicial conference on 21 December 2015 and directed that if Wallaceville wish to proceed with an application for security for costs it should file and serve such application no later than 14 December 2015. No such application was filed.

[5] All three parties appeared before the Court on 21 December 2015. Mr Persico represented himself. Counsel for Wallaceville formally withdrew the application for partial strikeout. At the conclusion of the judicial conference Mr Persico was directed to file and serve the following documents by Friday, 15 January 2016:

- An application for waiver of late service of his appeal which had been filed at the Court and served on Wallaceville and the Council within the statutory time limits but had not been served on other parties to the Council process;

- A memorandum identifying the matters he wished to pursue on appeal, the witnesses he intended to call in respect of those matters, the witnesses' areas of expertise, their contact details and confirmation that they are available to take part in witness conferencing.

[6] On 7 January 2016 Mr Persico filed an application for waiver for late service of his appeal documents together with advice that service had now been effected on the parties whom he had previously failed to serve. The documents filed by Mr Persico did not include advice as to the other matters (issues to be pursued on appeal and expert witness details) nor was any further documentation regarding those matters provided by 15 January 2016 as directed by the Court.

[7] On 18 January 2016 the Court received e-mail advice from Wallaceville that it might make an application for security for costs if Mr Persico's waiver application was granted. On 19 January 2016, the Court received a memorandum from the Council opposing the waiver application together with further advice from Wallaceville that it supported the Council's opposition and that it would apply for a strikeout even if the waiver was granted.

[8] As a result of the above process, as of 19 January 2016, there were three matters before the Court requiring resolution before this appeal could be advanced:

- Mr Persico's waiver application which was opposed;
- An indicated strikeout application based on Mr Persico's failure to comply with the Court's directions;
- An indicated application for security for costs.

[9] By way of minute dated 22 January 2016 the Court advised the parties that all three live matters would be considered together. Wallaceville and the Council were directed to file applications and supporting submissions on these issues by 1 February 2016 and Mr Persico was given until 15 February 2016 to respond.

[10] On 1 February 2016 a joint application was received from Wallaceville and the Council seeking to strike out Mr Persico's appeal on the grounds of failure to comply with the Court's directions together with a request for security for costs. Mr Persico filed a response to those applications on 11 February 2016.

[11] Before considering the three issues before the Court I observe that Mr Persico has been not been represented by counsel throughout the process which I have described above. He is of course entitled to represent himself, as many parties to proceedings before this Court do. It is not uncommon in that situation for litigants in person to fail to comply with procedural requirements. It is a well recognised principle in this situation that some latitude in compliance will be permitted to such parties if overall justice is to be done.[2] I will endeavour to have due regard to that principle when considering the matters for determination in this decision.

[12] For the sake of completeness I record that in the Court's initial minute of 11 December 2015, at the judicial conference of 21 December 2015 and in the minute which issued from that conference, I urged Mr Persico in specific and unambiguous terms to take appropriate legal advice.

Waiver Application

[13] There is no dispute that Mr Persico filed his notice of appeal with the Environment Court and served it on Wallaceville and the Council within 15 working days of receipt of the Council decision as required by s121(1)(c) RMA. Nor is there any dispute that he did not serve a copy of the notice of appeal on all other parties to the Council process within 5 working days of filing the appeal as required by s121(2) RMA. The appeal was filed on 5 November 2015 and accordingly the date for service on other parties was on or about 12 November 2015. In his waiver application Mr Persico advised that service on other parties was effected by him on 23 December 2015, a delay of approximately 6 weeks.

[2] *Schmidt v Ebada Property Investments Limited* [2012] NZCA 452.

[14] Section 281(1)(a)(i) provides that a person may apply to the Environment Court to waive a requirement as to the time within which a document is to be served. Mr Persico has now made an application accordingly.

[15] Section 281(2) provides that the Court shall not grant such an application *...unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.* Neither the Council nor Wallaceville have identified any undue prejudice to them arising as a result of late service of the proceedings on other potential parties. I note that no other potential parties have sought to join these proceedings as a result of belated service of Mr Persico's appeal on them.

[16] However consideration of s281(2) is not the sole issue in deciding whether or not to grant a waiver. It is necessary for the Court to consider what the merits of the waiver application might be including the reasons why service was not effected in accordance with the statutory requirements, particularly having regard to the extent of any delay. In this instance, Mr Persico simply provided no information enabling the Court to address that matter.

[17] Failing to comply with service requirements has a substantial *knock-on* effect in terms of prompt completion of the appeal process. Additional time has to be allowed for potential parties to consider and respond to any appeal documentation. Court directions as to process must have regard to the fact that additional parties may seek to join the appeal. This factor of itself gives rise to delay and complication in management of the appeal process in a situation where an applicant has received approval for its proposal. Although the delay and complication does not fall into the undue prejudice category it is nevertheless a real prejudice to a successful applicant who is entitled to have any appeal against its grant of consent resolved as promptly as is reasonable. For this and other reasons compliance with matters of form and process are not just formalities.

[18] In the normal course of events it might be assumed that Mr Persico was simply unaware of his obligations as to service. That cannot be said to be the case in

this instance as he provided the Court with details of the other parties he had served with the notice of appeal on 9 November 2015. It now transpires that the list of parties was incorrect. Further, the need for service of documents on all the other parties who made submissions to the Council process is clearly set out in the advice to litigants contained on the Environment Court homepage.

[19] In the absence of any explanation at all from Mr Persico as to the basis of and reasons for his failure to effect proper service it is simply not open for me to determine the merits of his waiver application and I must accordingly decline it.

[20] RMA is silent as to what happens in the event of a waiver application of this kind (failure to serve on parties other than the Applicant and Council) being declined. It is clear from the provisions of Regulation 17(1)(a) and (b) of the Resource Management (Forms, Fees, and Procedure) Regulations that a valid appeal has commenced as Mr Persico has lodged his appeal and paid the Court's filing fee. Nothing in RMA or the Regulations states that decline of a waiver application for failure to serve other parties automatically terminates the appeal although it is difficult to see any other practical outcome. In this case I propose considering the consequence of decline of the waiver in the context of the joint strike out application.

Strike out Application

[21] The Court's power to strike out a person's case is found in s279(4) RMA which relevantly provides:

> ***279 Powers of an Environment Judge sitting alone***
>
> *(4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as that 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.

[22] Paragraph 11 of the joint memorandum filed by counsel for Wallaceville and the Council identified the following grounds as the basis for their strikeout application:

11. The grounds for the current application are as follows:

(a) the failure of the Appellant to comply with the Court's minute and directions dated 21 December 2015, in that the Appellant did not file a memorandum by the date directed by the Court which identified the matters that he wishes to pursue on appeal and the witness(es) he will call;

(b) the Appellant's failure to file an appropriate or valid application for waiver of late service of his purported appeal such that a waiver should not be granted and the appeal should be struck out; and

(c) to allow the purported appeal to be taken further, in light of the Appellant's failure to comply with the Court's directions and/or properly commence the purported appeal by providing an appropriate explanation which might justify the granting of a waiver, would be an abuse of the process of the Environment Court under section 279(4)(c).

[23] In considering these issues it is pertinent to provide a little more background detail as to the matter which appears to be primarily in dispute in these proceedings, namely Mr Persico's contention that the appeal site contains life threatening contaminants which make it unsuitable for development as proposed by Wallaceville. This contention was made by Mr Persico and considered by the Council hearings committee which determined the outcome of PC40. Issue 1[3] of its decision addresses the issue of land contamination.

[3] Paras 320-351.

[24] Perusal of the Council decision establishes the following:

- The appeal site is identified on the Land Use Register of Sites, where activities involving the use of hazardous substances may have taken place, administered by the Wellington Regional Council;
- Prior to lodging its plan change request Wallaceville commissioned a preliminary site investigation by Geo Science Consulting Limited. That document recommended specific areas for further investigation to determine the degree of remediation (if any) required to make those areas suitable for the uses proposed by PC40;
- Having reviewed the plan change request and the preliminary environmental site investigation the Council required more investigations and a detailed environmental site investigation was obtained from a consultant company called ENGEO[4]. This document was completed on 17 March 2015 and provided to the Council. The investigation concluded (in summary) that:
  - The majority of the soil containing elevated background levels of contaminants could be disposed of at landfill;
  - Areas tested were generally suitable for residential use;
  - Further assessment of remediation would be required for one isolated area before residential use;
  - For that isolated area there are multiple options available for remediation and management;
- The Council commissioned an independent review of the investigations undertaken on behalf of Wallaceville from Golder Associates (NZ) Limited;
- In response to the report provided by Golder Associates, Wallaceville commissioned two further investigations from ENGEO which were provided to the Council for its consideration as part of the plan change process;

[4] A successor to Geo Science Consulting Ltd.

- The Council obtained further input on the contamination matter from Golder Associates after receipt of Wallaceville's additional reports;
- Evidence on contamination was provided to the Council hearings panel by two expert witnesses on behalf of Wallaceville and one expert advisor to the Council. The experts concluded that the site was suitable for its intended use under PC40, even having regard to material provided to the Council hearing by Mr Persico.

It is apparent from the above and from perusing the Council decision that the issue of contamination was extensively considered by the Council hearings panel having regard to detailed information on this topic.

[25] Mr Persico does not believe the evidence provided by the various experts who had considered the land contamination issue, although he did not present any evidence himself to the Council hearing from a witness with expertise on this matter. I am not critical of Mr Persico in saying that. I imagine that the cost of obtaining such evidence could well be beyond the resources of most members of the public. However the fact is that his views on the issue of contamination are the impressions of a person with no expertise in this matter. Nor did Mr Persico obtain any appropriate expert advice contrary to the evidence put to the Council hearing before he filed his appeal in these proceedings. In short, his opposition to PC40 and his appeal are based solely on his inexpert disbelief of the comprehensive evidence provided to the Council.

[26] On considering Mr Persico's statement in opposition to the strike out, it became apparent that his appeal is based on allegations of fraud, conspiracy, lies and false evidence on the part of the other participants in these proceedings. Those allegations extend to a contention that the Council hearing panel itself had lied in making findings which it did.

[27] I have given detailed consideration to these allegations together with the contents of the Council decision. Nothing in the Council decision supports the

intemperate allegations made by Mr Persico against the various witnesses concerned, the Council or the Council hearings panel. They simply disagree with Mr Persico's views.

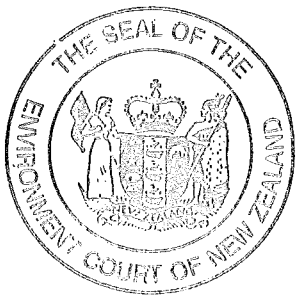
[28] At the judicial conference on 21 December 2015 Mr Persico was directed to file and serve a memorandum identifying the issues he wanted to pursue on appeal and the witnesses he intended to call in support of those matters. He has failed to do either of those things. Consequently the full range of matters raised in his submission and appeal namely:

- Past use of the land to bury toxic wastes;
- Alleged unsuccessful past remediation works;
- Flooding, traffic and noise;
- Industrial location;
- Proximity to military camp-

remain *alive*. Mr Persico has not indicated that he intends to provide evidence from any person with expertise in any of these matters in support of his case.

[29] In his initial response to the Court Mr Persico complained about the short period of time (21 December 2015 – 15 January 2016) given to him to obtain such witnesses. I make the following observations on that matter:

- Mr Persico's appeal raising these matters was filed on 5 November 2015. That is when he should have commenced the acquisition of evidence in support of his case. Again it is relevant to note that his appeal was filed without the benefit of expert advice on any of the matters which he had raised;
- If Mr Persico was in fact making progress towards obtaining appropriate evidential support, he could have advised the Court accordingly and sought further time. He has not done so;
- Further, it seems apparent from his memorandum of 11 February 2016 that he does not intend to provide evidence from expert witnesses. I have



drawn that conclusion from the paragraph of his response of 11 February 2016 headed ...***Do I need to have expert witnesses***;

- Finally, I observe that although Mr Persico's correspondence with the Court appears to concentrate on the issue of land contamination there has been no attempt in that correspondence to limit the issues on appeal so that the identity of witnesses on the other topics also remains a live issue.

[30] In their submissions Wallaceville and the Council put emphasis on Mr Persico's failure to follow the Court's directions. That is understandable. The obligation on participants in proceedings to follow directions made by the Court is well known to those who regularly appear before it however, as I have observed previously, it is common practice for the Court to make some allowance for self represented parties who may lack familiarity with Court process. Had the sole issue before the Court in determining the strike out application been failure to comply with directions and if there was any indication that Mr Persico was making genuine attempts to do so but was hindered by his lack of familiarity with the Court processes, I would have shown some flexibility to Mr Persico to enable him to present a cogent case to the Court. Unfortunately that is not the case. The various factors of:

- The appeal raising technical issues unsupported by any appropriate expert advice or evidence;
- The baseless and intemperate attack on the integrity of the Council hearings panel;
- The failure to serve other potentially interested parties with a copy of the notice of appeal within the statutory time period (a failure which has not been remedied by waiver);
- The failure to identify issues to be pursued on appeal in accordance with the Court's directions;
- The failure to identify witnesses in support of the appeal –

when considered in combination, weigh heavily in favour of grant of the strike out application.

[31] A factor of particular weight in that regard is that it is apparent that Mr Persico's appeal is vexatious having been brought maliciously[5] in the sense that he seeks to malign various witnesses, the Council and the Council hearings panel through this appeal. I further consider that the material from Mr Persico discloses no reasonable or relevant case in respect of the proceedings and that it accordingly would be an abuse of the process of the Court to allow the proceedings to remain afoot.

[32] In reaching the above conclusion I have been conscious of the principle of public participation. I have had regard to the observation of the Court in *Paterson v Canterbury Regional Council*[6] that sparseness of evidence is not an automatic basis for strikeout and that an appellant has a right to make submissions and cross-examine other parties' witnesses. I have also had regard to the various issues which I addressed in paragraphs [20] – [29] of my decision in *Fonterra Co-operative Group Limited & Gillespie v Manawatu-Wanganui Regional Council,*[7] where I declined to strike out an appeal raising some similar issues to this in terms of the absence of supporting evidence. The very clear distinction between *Fonterra* and this case was my finding in those proceedings that there was no suggestion that Mr Gillespie's appeal was vexatious, unlike my finding in this case. Nor was there any failure to comply with directions on Mr Gillespie's part.

[33] In light of these findings I strike out the appeal on the grounds set out in s279(4)(a), (b) and (c).

Security for Costs

[34] The consequence of my decision on strike out is that I do not need to make a ruling on the issue of security for costs. For the sake of completeness (and in the event that I might be considered wrong in my earlier conclusions) I nevertheless briefly express my views on that issue.

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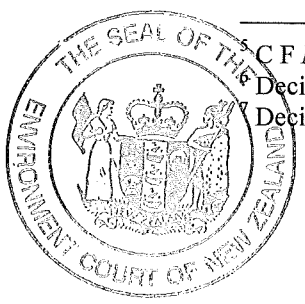
[5] C F *Ngati Kahu Trust Board v Northland Regional Council* Decision No. A048/94.
[6] Decision No. [2010] NZEnvC 408.
[7] Decision No. [2013] NZEnvC 032.



[35] Both Wallaceville and the Council have estimated that their costs on appeal are likely to be in the order of $25,000 (excluding GST and disbursements). They each seek security for costs in the order of $10,000 being approximately 40% of potential costs. Mr Persico has not challenged the cost estimates in any way but simply contends that there is no justification for the other parties to be awarded costs. I find that the quantum of security sought is fair and reasonable.

[36] The Court's power to require security for costs arises pursuant to s278(1) RMA which provides that the Environment Court has the same powers as a District Court.

[37] Rule 5.48(1)(b) District Court Rules 2014 allows an order for security for costs to be made if *...the court is satisfied ...(b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceedings.* I observe that in these proceedings the word *Appellant* should be substituted for *plaintiff* and the words *Wallaceville* and the *Council* should be substituted for the *defendant.* If the threshold in rule 5.48(1)(b) is met then rule 5.48(2) provides that *...the court may, if it thinks fit in all the circumstances, order the giving of security for costs.*

[38] Application of the rules in question requires a two step process. The first step is determining whether or not there is reason to believe that Mr Persico will be unable to pay the other parties' costs if he is unsuccessful in these proceedings. If I find that to be the case the second step is considering whether or not to exercise the discretion to require security.

[39] In undertaking the first step I make two initial observations:

- Firstly, that rule 5.48 does not require me to find conclusively that Mr Persico will be unable to pay the other parties costs. What it requires me to find is that there is reason to believe that he will not be able to do so;

- Secondly, the rule does not establish an onus of proof either way. I have approached my considerations on the basis of a broad enquiry having regard to such information as I have.

[40] Dealing with the issue of Mr Persico's ability to meet an award of costs, I record that there is no direct information before the Court as to his financial standing. Notwithstanding, I concur with Wallaceville's submission that Mr Persico's financial status and inability to meet a costs award have *effectively been conceded* as the result of concessions made by Mr Persico at the judicial conference of 21 December 2015. Mr Persico indicated that he was unable to meet the costs of a legal representative and did not confirm that he would be in a position to meet an award of costs when questioned by the Court. Given those concessions I determine that I have reason to believe that Mr Persico will be unable to pay the costs of the other parties if he is unsuccessful in these proceedings.

[41] That finding brings me to consider whether I would exercise my discretion to require Mr Persico to provide security for costs in this case. The principles and criteria against which the Court's discretion might be exercised are summarised in the head note from the judgment *Bell-Booth Group Limited v Attorney General.*[8] Those considerations are set out in full in Wallaceville's submissions so I do not repeat them here.

[42] In considering exercise of the discretion I have had particular regard to the principle that security awards should not be used to oppressively shut out a genuine case by a party of limited means. Mr Persico's failure to provide any evidence in support of his position (either at the Council hearing or since) together with the absence of any indication that he is making progress towards the provision of such evidence (or even intends to do so) raise serious question marks as to the genuineness of his appeal. In making that observation I accept that Mr Persico is genuine in his beliefs but that does not mean that his case is genuine in the sense that it can be substantiated by appropriate evidence.

[8] (1986) 1 PRNZ 457.

[43] I do not see any element of oppression in the applications made by Wallaceville or the Council. As described previously, the issue of land contamination has been subject to extensive examination on behalf of Wallaceville, by the Council as processing authority and by the Council hearings panel. Mr Persico requires the parties to undertake that exercise again before the Court without having provided any substantive evidence to establish that the previous findings are wrong. Under those circumstances I consider it inevitable that the other parties would seek security for their costs.

[44] Similarly it must be acknowledged that in the absence of any probative evidence on his part there is a real possibility that Mr Persico's case, based on his own unsubstantiated opinion on matters of expertise, may fail.

[45] Having regard to all of those factors I consider that there is a high degree of possibility that Mr Persico would be subject to a costs award should his case on appeal not succeed. I regard that as being the case even having regard to the fact that it is not the Court's normal practice to award costs on plan change appeals.[9] In my view similar factors would apply as led to the Court making an award for costs in the *St Heliers Capital Limited v Kapiti Coast District Council*[10] plan change appeal.

[46] For all of these reasons I can indicate that if this appeal had not been otherwise disposed of (as it has) I would require Mr Persico to provide security for costs in the amount sought by Wallaceville and the Council.

DATED at Wellington this 3rd day of March 2016

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

B P Dwyer
Environment Judge

[9] Environment Court Practice Note 2014, Section 6, para 6.6(b).