BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 123

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to clause 14 of the First Schedule of the Act
BETWEEN	UPPER CLUTHA ENVIRONMENTAL SOCIETY INCORPORATED
	(ENV-2018-CHC-056)
	DARBY PLANNING LIMITED
	(ENV-2018-CHC-150)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Sitting alone under s279 of the Act
Hearing:	In Chambers at Christchurch (Final memorandum received 5 June 2020)
Date of Decision:	12 August 2020
Date of Issue:	12 August 2020

PROCEDURAL DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR RE-HEARING AND RELATED DIRECTIONS

A: The application for re-hearing under s294 of the Resource Management Act 1991 and related directions is **declined**.

B: Costs will lie where they fall.

REASONS

Introduction

[1] This decision concerns an application for a partial re-hearing of Decision 2.2[1] and related directions. The applicant is Dr John Cossens, a s274 party to the appeals by the Upper Clutha Environmental Society Incorporated ('UCESI') and Darby Planning Limited.

Background

[2] Dr Cossens' first memorandum, dated 27 January 2020, ostensibly sought directions in response to Decision 2.2. A Minute issued on 21 February 2020 declined this application. In summary, that was because the directions sought would have extended significantly beyond what Decision 2.2 contemplated.[2]

[3] Dr Cossens filed a second memorandum, dated 1 April 2020, in response to the COVID-19 Level 4 lockdown. Noting the economic hardship implications facing the community, it sought directions as to whether the Topic 2 proposals remained fit for purpose.[3] That application was also declined by Minute dated 3 April 2020.[4] The Minute recorded that "... the court does not have jurisdiction to revisit matters already decided (or currently at the High Court)".

[4] Following that decision, Dr Cossens filed further memoranda seeking that the court reconsider – one on 5 April, another on 2 June and another on 5 June 2020. These memoranda repeat Dr Cossens' position that COVID-19 calls for a substantive reconsideration of elements of Decision 2.2. In his June memoranda, Dr Cossens raises the withdrawal by UCESI of its High Court appeal against Decision 2.2 as an additional reason why a partial rehearing of Decision 2.2 is appropriate. His 5 June memorandum also comments:[5]

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1 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 205.
2 Minute dated 4 February 2020. Belatedly, following the issuance of that Minute, QLDC filed a memorandum dated 4 February 2020 recording that it opposed the application.
3 Memorandum of counsel on behalf of Dr Cossens dated 1 April 2020.
4 Minute dated 3 April 2020.
5 Memorandum of counsel on behalf of Dr Cossens dated 5 June 2020 at [13].

> Thus, this submission respectfully seeks that under the auspices of s274 [sic][6] RMA, the Court direct the Council to readjust its proposed timetable to reflect the changed circumstance with the identification of appropriate and robust methodologies now becoming the first step in the timeline.

[5] There are important due process reasons why parties are expected to respect the finality of what the court determines in both substantive and procedural matters. It can impose costs and inconvenience on other parties and divert the court's limited resources. Hence, the court can sanction a party for abuse of process if that is called for.

[6] I acknowledge, however, that a development since the 3 April Minute is that UCESI has withdrawn its High Court appeal. Furthermore, it appears that the withdrawal was prompted by QLDC's commitments to undertake a landscape study of the Upper Clutha Basin. That is at least a matter of potential interest to various parties. In that context, as I signalled by Minute dated 8 June 2020, I am satisfied that the proper course is to determine these matters by this decision, even though it means covering some of what is already determined by the 3 April Minute.

[7] Dr Cossens has not sought to be heard on his new application. QLDC filed a memorandum dated 5 June 2020 as to why it opposes the directions sought. No other party has responded. I am satisfied I am in a position to determine the matter on the papers before me.

Dr Cossens' position

[8] Dr Cossens explains that he does not seek a full re-hearing under s294. Rather, he seeks this be limited to the court enabling parties to make submissions that would inform a further decision by the court on the proper way forward.[7] He also questions the value of and approach to court-directed landscape expert conferencing and seeks directions to revisit these matters. However, Dr Cossens did not call any expert evidence in the hearing for Decision 2.2.

6 I take this reference to be intended to be to s294, which Dr Cossens notes elsewhere as providing jurisdiction to grant his request for re-hearing.

7 Second memorandum on behalf of Dr Cossens dated 5 April 2020 at [14].

[9] As for s294, Dr Cossens characterises COVID-19 as the "greatest exogenous economic shock this country has faced for a hundred years".[8] He submits that, in that sense, the prerequisites for a re-hearing under s294 are inherently satisfied.[9] He submits that QLDC's commitment to UCESI to undertake a full landscape study of the entire Upper Clutha Basin cuts across and makes pointless the identification of priority areas by the expert witness group as directed by Decision 2.2. He observes that QLDC has identified all RCL areas as priority areas.[10]

[10] In addition, Dr Cossens refers to the fact that Decision 2.2 was stated to be "interim" and set out reporting directions. He understands that to enable the court to revisit matters on a relatively broad basis. He characterises the court's powers as wide-ranging and flexible to ensure the principles of the RMA are upheld.[11]

QLDC response

[11] In opposing the directions sought, Ms Scott provides some background to arrangements QLDC has agreed to with UCESI, including:[12]

> Council has decided to undertake a landscape study of the entire Upper Clutha RCL. Council will therefore be proposing that the entire Upper Clutha RCL be treated as a priority area in its memorandum on 2 July 2020.

[12] However, counsel says that this commitment does not change the approach for the ONF/L priority areas under Decision 2.2 nor warrant any change to directions on expert conferencing. Counsel's reasoning is as follows:[13]

> It is of course for the Court to make a final decision as to what is to be identified in the district plan as a priority area for the Upper Clutha RCL. If the Court confirms certain parts of the RCL to be a priority area only, the Council has still undertaken to complete a study of the entire Upper Clutha RCL. In doing so, it will follow the methodology that will be set out in the 'Values Identification Framework' (VIF) Strategic Policies, for the Upper Clutha RCL, as directed in Decision 2.2 (see, for example, paragraph [262]).

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8 Second memorandum on behalf of Dr Cossens dated 5 April 2020 at [14].
9 Second memorandum on behalf of Dr Cossens dated 5 April 2020 at [12]-[14].
10 Fourth memorandum on behalf of Dr Cossens dated 5 June 2020 at [2].
11 Second memorandum on behalf of Dr Cossens dated 5 April 2020 at [15], third memorandum on behalf of Dr Cossens dated 2 June 2020 at [27]-[32].
12 Memorandum of counsel for QLDC dated 5 June 2020.
13 Memorandum of counsel for QLDC dated 5 June 2020 at [3]-[6].

> While the conferencing outputs for the Upper Clutha RCL will not require new maps, given that the new Strategic Policies will be able to refer to the Upper Clutha RCL on the district plan maps, there will need to be expert conferencing on the wording of the Strategic Policies that will specify the landscape assessment methodology for the Upper Clutha RCL (and the ONF/L priority areas). That will result in the filing of a Joint Witness Statement, and (following completion of the other directions set out in the Council's proposed timetable) a Court decision on these matters.
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> In addition, the question of whether a section 293 process is required in relation to the VIF for the Upper Clutha RCL still needs to be addressed, and a date for that has been proposed by Council's timetable. Council cannot commence any landscape study for the Upper Clutha RCL until it has a decision from the Court. Council's decision on the Upper Clutha RCL does not change the approach for the ONF/L priority areas, nor the timetable and steps proposed by Council on 28 May 2020.

Discussion

[13] Dr Cossens does not correctly interpret Decision 2.2. It is not a decision open to be revisited on broad matters of substance as he assumes. Nor is he correct in his characterisation of the court's powers as "wide-ranging and flexible". His observations on that would appear to confuse the court's appellate jurisdiction with that of the statutory planning authority, in this case QLDC. That distinction was noted as a reason for declining Dr Cossens' application for directions in the court's 3 April 2020 Minute. It was also noted in Decision 2.2.[14]

[14] While the word 'interim' appears on the first page of the decision, there is nothing particularly unusual or significant about that. Rather, as is frequently the case with plan appeal decisions, Decision 2.2 determines some matters with finality and others on an interim basis, subject to directions that will help inform the court's final decision(s) on those expressly reserved matters. Hence, the decision is 'interim' in that sense.

[15] One respect in which Decision 2.2 is final is its determination to allow in part and/or decline in part the various Topic 2 points of appeal summarised in its Annexure 3. That includes the points of appeal raised by UCESI that were the subject of its High Court appeal. Now that UCESI has withdrawn that appeal, there is no longer a prospect that any Higher Court determination may direct that Decision 2.2 be revisited in those terms.

[14] Decision 2.2, at [130], [131], [138], [143], [144] and [147].

[16] Decision 2.2 includes a number of related findings which are likewise final, including those at [165] – [168]. Those findings include:[15]

> Given the stage now reached in the updating of the ODP through the review, we find it particularly important that those principles can be applied to the further remediation of the ODP, through Sch 1 plan change processes in relation to Priority Areas that the new strategic policies will specify. As noted, those Priority Areas are to be determined by reference to where the most significant development pressures are anticipated during the life of the ODP. The identification of an area as a Priority Area is not intended to connote any higher relative ONF/L or RCL quality rating. If need be, the SPs could make that explicit.
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> Those findings leave aside the broader issue of what other aspects of the ODP QLDC may need to change in conjunction with Sch 1 change as would be subject to the directions in the Values' Identification Frameworks. However, the RMA's purpose and principles, and s32 and other directions as to planning processes would govern those matters (rather than the new Strategic Policies for the Values' Identification Framework).

[17] Similarly final are the findings on matters concerning the Values' Identification Frameworks, including at [169] – [180] (as to the Upper Clutha RCL) and in Part D (concerning the substance of related PDP provisions for ss 6(b) and 7(c)).

[18] Those findings inform the procedural directions given by Decision 2.2 (including for further expert conferencing). Those directions do not qualify the finality of what Decision 2.2 determines. Rather, they serve to give effect to those determinations and related findings. That is by helping inform the court's finalisation of the substantive content of those related Topic 2: Rural Landscapes provisions that Decision 2.2 has left to be finalised by further decision.

[19] That analysis leads me to conclude that any revisiting of the determinations made by Decision 2.2 concerning appeals, and related findings, is only permissible to the extent allowed by s294, RMA.

[20] Section 294 is as follows:

> **294 Review of decision by court**
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> (1) Where, after any decision has been given by the Environment Court, new and important evidence becomes available or there has been a change in circumstances that in either case might have affected the decision, the court shall have power to

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15 *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 205 at [167]-[168].

order a rehearing of the proceedings on such terms and conditions as it thinks reasonable.

(2) Any party may apply to the court on any of those grounds for a rehearing of the proceedings; and in any such case the court, after notice to the other parties concerned and after hearing such evidence as it thinks fit, shall determine whether and (if so) on what conditions the proceedings shall be reheard.

(3) The decision of the court on any such proceedings shall have the same effect as a decision of the court on the original proceedings.

[21] Even where s294 is applicable, careful consideration is required as to whether, and on what basis, any revisiting of a decision would be fair and appropriate. In particular, there should be finality to litigation and the court should not order a re-hearing unless there has been a miscarriage of justice.[16]

[22] Dr Cossens could well be right in his characterisation of the perilous economic consequences of the ongoing COVID-19 crisis. That is particularly so for the Queenstown district economy, given its historic underpinnings by international and domestic tourism. However, his application is simply based on his personal opinions. By contrast, s294 requires "new and important *evidence*" (my emphasis) or "a change in circumstances" that "in either case might have affected the decision".

[23] There is no evidence on these matters before the court at this time, nor am I satisfied that there is a relevant or sufficient change in circumstances.

[24] Insofar as COVID-19 has implications for the Queenstown economy, those implications are properly for QLDC to consider in its capacity as the responsible planning authority. That is both in terms of whether any planning response is warranted and, if so, what that response ought to be. A range of potential resource management responses could be available. For example, those could range from greater development enhancement through to greater or different protection of identified landscape values. It is not for the court to direct QLDC about whether or what response may be appropriate. Rather the statutory planning responsibility lies with QLDC. The proper vehicle for any responses QLDC may elect would be a variation. As the RMA intends and provides, that would allow for both the evaluation of options through s32 and rights of participation and appeal.

16 *Landcorp Ltd v Auckland City Council* A028/09, at [8].

[25] It would not be a proper exercise of s294 powers for the court to invite parties to make submissions for such purposes.

[26] As matters presently stand, that is similarly the case in relation to the commitment QLDC has made to UCESI as to an Upper Clutha Basin landscape study. It is QLDC's prerogative, as a local authority and planning authority, to commit resources to such a study. Insofar as this commitment aligns with this aspect of relief in UCESI's appeal, that has no bearing on the court's processes. As I have noted, Decision 2.2 is final in having declined this aspect of UCESI's relief. As matters stand, nor does QLDC's commitment to undertaking that study render the directions in Decision 2.2 on expert conferencing redundant. Rather, as I have explained, those directions serve to provide the court with the information it seeks to complete its determination of the provisions that Decision 2.2 determines will be included in the PDP. In any case, as noted, Dr Cossens did not call expert evidence.

[27] It was open to QLDC to respond to the directions in Decision 2.2 in the manner it has in its 10 July 2020 memorandum (including that the entire Upper Clutha RCL be identified as a Priority Area). Whether or not it will be so identified is a matter for the court to determine on the evidence before it.

Outcome

[28] Accordingly, Dr Cossens' application for re-hearing and request for directions is **declined.**

[29] On this occasion, I am satisfied that costs should lie where they fall. One reason for that is that QLDC was the only party to respond to Dr Cossens' application. Furthermore, QLDC's relatively short response accords with its respondent responsibilities of informing the court and parties of the true nature and purpose of its decision to proceed with an Upper Clutha landscape study.

J J M Hassan
Environment Judge