IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2014
[2014] NZSC 99

BETWEEN	PHILIP JOHN WOOLLEY Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and Arnold JJ
Counsel:	D J Clark for Applicant A Markham and A A Jacobs for Respondent
Judgment:	5 August 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal upholding convictions for offences against the Resource Management Act 1991 associated with his use of a digger in a wetland reserve adjacent to his farm to excavate and enlarge an existing drainage channel, an exercise which resulted in the destruction of vegetation in a strip about 10 metres wide to one side of the channel.[1] The convictions upheld by the Court of Appeal were for:

(a) depositing soil and vegetation on the bed of a river; and

(b) disturbing the bed of a river;

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1 *Woolley v R* [2014] NZCA 178 (Ellen France, MacKenzie and Mallon JJ).

in each case when not expressly allowed to do so by a rule in a regional plan or a resource consent. It is common ground that the wetland area concerned forms part of the bed of a river.

[2] The Marlborough District Council exercises the functions of a regional council. Under its Wairau/Awatere Resource Management Plan (WARMP) the maintenance of existing drainage channels is a permitted use. The applicant's defence at trial was that his excavation of the drain (and associated depositing of debris on the side of the drain) was thus permitted. He maintained that the rule in the WARMP he relied on was a "rule in a regional plan" and that his actions did not go beyond maintenance of the kind contemplated by the rule. This defence was rejected in the District Court and again in the Court of Appeal.

[3] Both the District Court and Court of Appeal were prepared to accept, at least for the sake of argument, that the rule relied on should be treated as a "rule in a regional plan". It is, however, well open to argument that this is not so, for reasons explained in the Court of Appeal judgment.[2] The case was resolved against the applicant in both courts on the basis of interpretations of the rule and findings of fact.

[4] The drain is on land formerly owned by the applicant which he transferred to the Council some years ago and now forms part of a wetland conservation area. It is difficult, to say the least, to see how, to use the language of the respondent, it could be:

> "maintenance" for the applicant, uninvited, to seek to return the wetland to its former, historical state.

In the case of both counts there were findings by the trial Judge that what happened went beyond what could be regarded as collateral to the maintenance of the channel. These findings were not addressed in the Court of Appeal judgment but would have to be if leave were granted. They do not appear to have been specifically challenged in the submissions filed in support of the application for leave to appeal. There are, as well, concurrent findings that the work in question went beyond any previous

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[2] At [47].

maintenance of the drain. These latter findings have been subject to detailed criticism in the submissions filed on behalf of the applicant.

[5] We note that the applicant seeks to rely on material which was not in evidence as to maintenance by the Council of another section of the drain. There has been no application for leave to adduce further evidence and, on the basis of the response from the Crown, we see nothing in the material which would warrant leave to appeal.

[6] We accept that the case gives rise to issues which could be debated, for instance, assuming that the relevant rule is to be treated as a regional rule, what is contemplated by "maintenance", as well as to the extent of earlier work on the drain as compared to the work which resulted in the charges. We see, however, no point of public or general importance in the interpretation issue. As well, the purpose of allowing a second appeal is not to facilitate what would be a third examination of the facts. All in all, we see no appearance of a miscarriage of justice.

[7] The applicant also seeks leave to appeal against sentence. Again we see no appearance of a miscarriage of justice.

Solicitors:
Wisheart Macnab & Partners, Blenheim for Applicant
Crown Law Office, Wellington for Respondent