[redacted]

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

AP41/00

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UNDER	Section 299, Resource Management Act 1991
IN THE MATTER	of an appeal against a decision of the Environment Court
BETWEEN	J G & H SHAW AND HALSWATER HOLDINGS LIMITED AND APPLEFIELDS LIMITED Appellants
AND	SELWYN DISTRICT COUNCIL Respondent

Hearing: 20 and 21 February 2001

Counsel: P A Steven for the Appellant
K G Smith for the Respondent
M Perpick for the Canterbury Regional Council

Judgment: 19 March 2001

JUDGMENT OF CHISHOLM J

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[1] References lodged by the appellants in relation to a change to the Selwyn District Council transitional plan and a variation thereto were rejected by the Environment Court on jurisdictional grounds. The appellants claim that the Court erred in law by determining their references on jurisdictional grounds and declining to consider them on their merits. Orders are sought cancelling the Environment Court

decision and referring the references back to the Court for determination on their merits.

Background

[2] Selwyn District Council introduced plan change 25 (*"the change"*) for the purpose of replacing outmoded transitional plan rules relating to subdivision/erection of dwellings in that part of its District known as the *"green belt"* which is adjacent to the boundary with Christchurch City. Under the proposed new rules subdivision into allotments down to 10 ha was to be a controlled activity and subdivision down to 4 ha a discretionary activity. Erection of dwellings on the resulting allotments was to be a permitted activity.

[3] Mr and Mrs Shaw lodged a submission seeking relief in various forms aimed at reducing the minimum allotment sizes below those proposed in the change. Various submissions under the umbrella of the Halswater group of companies (*"the Halswater group"*) sought site specific changes of zoning coupled with the ability to subdivide down to 5,000 square metres. The Council rejected the relief sought by Mr and Mrs Shaw and the Halswater group but modified the change by adding a new policy (*"Policy 2"*) which recognised the possibility of subdivisional consents for a noncomplying activity down to an allotment size of 2 ha in cases where criteria specified in the policy could be met.

[4] References to the Environment Court were lodged by Mr and Mrs Shaw and the Halswater group. In each case the relief sought in the reference broadly reflected

the relief sought in the original submission. Notwithstanding its stance that there was no jurisdiction to grant the relief sought by the Halswater group, the Council entered into negotiations with that group. Ultimately those parties placed a consent memorandum before the Environment Court without prejudice to the Council's stance that there was no jurisdiction to grant the zoning relief sought by the Halswater group. In due course the Environment Court heard argument about the Court's power to grant the relief sought in the various references.

[5] By its decision of 25 March 1999 (*"the first decision"*) the Court concluded that it did not have jurisdiction to grant the rezoning relief sought by the Halswater group but that there was nevertheless a *"kernel of relief"* remaining in the reference which could be considered on its merits, namely, the request for a minimum allotment size of $5000M^2$ as a controlled activity and the establishment of a dwelling on any such allotment as a permitted activity. Except for that component the relief sought in the Halswater group's reference was struck out. Although the relief sought in the Shaw reference also seems to have been challenged by the Councils, the Court concluded that the relief sought in that reference could be considered on its merits. There was no appeal against the first decision.

[6] A few days later the Environment Court released its decision in *Yates v Selwyn District Council* (C44/99, 31 March 1999) which arose from another reference concerning the change. In *Yates* the Court recorded its view that part of Policy 2 might be ultra vires. This prompted the Council to notify variation 1 to the change for the purpose of deleting Policy 2. Applefields lodged a submission opposing that variation and seeking either reinstatement of Policy 2 in its entirety or with such

modification as may be necessary to avoid any vires problems. When the deletion of Policy 2 was affirmed by the Council, Applefields lodged a reference with the Environment Court. In terms of relief sought the reference went somewhat further than the submission.

[7] The appellants' references were heard together by the Environment Court over a period of six hearing days during August 2000. Full cases on the merits were advanced by the referrers, the Regional Council and Minister for the Environment. Although Selwyn District Council also opposed the references, it seems that the Council's opposition was on a more restricted basis, but for present purposes that is not a matter of moment. It is common ground that the matter was contested on the merits, no issues having been raised by any of the parties as purely jurisdictional issues.

[8] In its decision of 26 October 2000, which is the decision under appeal, the Court concluded that it had no jurisdiction to grant the relief sought in the Applefields reference because the relief sought went beyond the variation and the company's original submission. The Shaw/Halswater group references also failed. In relation to those references the Court concluded that it had no jurisdiction to grant the relief sought because there was nothing in the objectives and policies of the transitional plan that could justify rules of the type proposed by the referrers and no new objectives and policies had been sought in the referrers' submissions.

Grounds Of Appeal

[9] In relation to the Applefields reference it is claimed that the Environment Court erred when it declined jurisdiction on the basis that the relief sought by Applefields did not refer to a matter that was contained in its submission. Applefields maintains that the whole, or alternatively at least part, of the relief sought in its reference was within the scope of its submission.

[10] Several errors of law are advanced in relation to the references lodged by Mr and Mrs Shaw and the Halswater group, namely, that the Court erred when it decided:

- That as a matter of jurisdiction the proposed rules sought to be included by them had to be justified by objectives and policies either in the transitional plan or in the references themselves.
- There was nothing in the specific objectives and policies in the transitional plan as amended by the change which justified the rules sought by the appellants.
- That:

> *"The scheme of those objectives and policies, especially when read in the light of and given further precision by the zone statements, is clear and unambiguous in our view: the policy is that in the Rural 2 and 3 zones there is a minimum lot size of four (4) ha."*

- The Court had no jurisdiction to consider the merits of the relief sought because no new objectives sought or policies were suggested in either referrers' submission.
- That the referrers were seeking a completely new set of objectives and policies, which objectives and policies were not sought in the original submission or reference.

- That it was outside the jurisdiction of the Court to grant the relief sought by the referrers for the reason that the original submission or reference did not contain *"any relevant suggestions for appropriate objectives and policies ..."*.

Underlying each of these grounds of appeal is the theme that the Environment Court should have determined the references on their merits rather than rejecting them on jurisdictional grounds.

Applefields' Reference

[11] Since the appeal arising from this reference revolves around the relief sought in the submission and reference, it is helpful to reproduce the request for relief in each of those documents. The submission:

> *"(a) That the Council reinstates Policy 2 in its entirety.*
>
> *Alternatively*
>
> *(b) That the Council reinstate Policy 2 in amended form to reflect the concerns of the Court in Yates v Selwyn District Council ie. To redraft the policy so that it is in keeping with the original intention but in such a way so as to avoid any perceived concerns about the vires of the provision. For example, to delete the reference to non-complying activities and redraft the criteria as objectives.*
>
> *(c) All consequential or other amendments to give effect to this submission."*

And the reference:

> *"(a) That the Council reinstate Policy 2 in its entirety*
>
> *Or in the alternative if the relief sought in paragraph (a) cannot be had:*
>
> *(b) That the Council reinstate Policy 2 in amended form to reflect the concerns of the Court in Yates v Selwyn District Council, i.e. to redraft the policy so that it is in keeping with the original intention but in such a way as avoids any perceived concerns about the vires of the provision. For example, to delete the reference to non-complying activities and redraft the criteria as objectives.*
>
> *Or in the alternative if the relief sought in paragraphs (a) or (b) cannot be had:*

(c) That Policy 2 be redrafted and inserted in Change 25 as follows (or to like effect):

> *To provide for a pattern of subdivision and density of building development around the boundary of townships in the green belt area in Selwyn District which reflects the character of the location and potential constraints.*
>
> *Explanation*
>
> *Policy 2 recognises that some townships in the green belt area contain allotments which are already subdivided to less than 4 hectares in size. Policy 2 contemplates further subdivision in these areas provided that any adverse effects on the environment are minor. The pattern of subdivision and density of development around townships in the green belt area will be subject to a degree of control to reflect the potential adverse effects on the environment, including:*
>
> - *The effects on soil and water resources;*
> - *The potential for conflict arising from increased residential density under the Airport Flight Path Noise Contours on Christchurch International Airport.*

(d) Any consequential amendments to give effect to any of the above reliefs."

Before the Environment Court it was argued on behalf of the Councils that the relief sought in paragraph (c) of the reference should not be granted because it went beyond the scope of the original submission. That allegation was rejected by Applefields.

[12] The Environment Court considered that clause 14(1) of the first schedule to the Resource Management Act 1991 governed the scope of the reference. In terms of that clause the Court accepted that Applefields had made a submission and that its reference related to a provision excluded from the plan (Policy 2) but it found that Applefields had not referred to the matter in its submission with the result that:

> *"... the relief sought in the reference goes beyond the variation (which sought deletion of policy 2) or the Apple Fields submission seeking reinstatement of policy 2 in plan change 25 (albeit in a legal form). Neither the variation nor the submission seeks an extension of policy 2. Nor can a request for consequential relief extend the scope of the reference. ...".*

Thus the Court concluded that it had no jurisdiction to grant the relief sought by Applefields and declined to consider the reference any further.

[13] Ms Steven complained that the Environment Court had ignored the first two grounds of relief in the submission, both of which had been repeated in the reference. She said that those grounds had not been abandoned and that while the focus might have been on the third ground, legal argument had been advanced about the desirability of having a policy relating to subdivision as a noncomplying activity and about the vires of Policy 2. She noted that the Court had not commented on those arguments. Ms Steven also submitted that even if the third ground of relief set out in the reference went beyond the original submission, it was nevertheless authorised by clause 16B of the first schedule to the Act.

[14] It is common ground that the Environment Court was right when it decided that the scope of the reference was governed by clause 14(1) of the first schedule to the Act which provides:

> *(14) **Reference of decision on submissions and requirements to the Environment Court**:*
>
> *(1) Any person who made a submission on a proposed ... plan may refer to the Environment Court:*
>
> > *(a) Any provision included in the proposed ... plan, or a provision which the decision on submissions proposes to include in the ... plan; or*
> >
> > *(b) Any matter excluded from the proposed ... plan, or a provision, which the decision on submissions proposes to exclude from the ... plan*
>
> *if that person referred to that provision or matter in that person's submission on the proposed ... plan."*

By virtue of clauses 1(1) and 16A(2) of the first schedule that provision applies to plan changes and variations. If a reference complies with clause 14(1) the Court is required by clause 15 to hold a hearing into the provision or matter referred to it. In other words, it could not in the ordinary course of events reject the reference on purely jurisdictional grounds.

[15] On the face of its decision the Environment Court rejected the reference on the basis of the relief sought in paragraph (c), presumably on the basis that it was under the impression that the first two grounds had been abandoned. When he prepared his submissions in relation to this appeal Mr Smith was also under that impression. But faced with Ms Stevens' firm stance that the first two grounds of appeal had not been abandoned, both Mr Smith and Ms Perpick were forced to acknowledge that there was no record of any formal abandonment. Nor did they attempt to refute Ms Stevens' submission that argument had been advanced on behalf of Applefields about the desirability of Policy 2 and about its vires.

[16] Given that situation I must proceed on the basis that when the Environment Court declined jurisdiction it was under a misapprehension. If the Court had been aware of the true situation and had taken into account paragraphs (a), (b) and (d) of the reference, all of which effectively duplicated the submission, a determination on the merits would have been necessary. It was submitted that since a determination on the merits would have produced the same outcome it would be pointless to now refer the matter back. I cannot be sure about that. Under those circumstances the safest course is to refer the matter back so that the Environment Court can consider the relief sought in paragraphs (a), (b) and (d) of the reference on the merits.

[17] In my opinion the Environment Court was correct when it rejected the relief claimed in paragraph (c) of the reference on the basis that the relief sought went beyond the submission and the variation. Before Policy 2 could apply the four criteria specified in the policy had to be met. That fundamental requirement is absent from the redrafted Policy 2 and accompanying explanation advanced in paragraph (c) of the

reference. Thus this paragraph goes beyond the scope of the variation. It also goes beyond the original submission which only sought to reinstate the policy in its entirety or with such modification as might be necessary to avoid any ultra vires problem, there being no suggestion that the ultra vires problem (if there was in fact a problem) stemmed from the four criteria specified in the policy.

[18] In reaching that conclusion I have not overlooked Ms Steven's argument relying on clause 16B of the first schedule to the Act. That clause provides:

> *"**Merger with proposed policy statement or plan**- Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against that variation."*

Relying primarily on the second part of this clause following the semi-colon. Ms Steven argued that by the time the Applefields reference was lodged with the Environment Court the variation had caught up with the plan change and the two merged. Thus, she submitted, when considering the scope of the original submission the Environment Court should have taken into account not only Applefields' original submission to the variation but also the submission of the Halswater group to the plan change.

[19] I cannot accept that proposition. The second part of clause 16B is designed to protect the position of those who have lodged submissions or appeals *before* a variation substitutes a provision for the provision against which the submission or appeal had been lodged. In that situation the submission or appeal automatically becomes a submission or appeal against the variation which is, of course, entirely

logical. On the other hand, the Applefields submission was lodged *after* the variation had been notified with the result that clause 16B cannot have any application.

Smith/Halswater Group References

[20] Before the Environment Court it was argued in opposition to these references that they must fail because the rule changes they sought could not be justified by any objective or policy. As far as I can gather, these arguments were not advanced as jurisdictional points but rather as reasons for declining the references on the merits.

[21] The Environment Court started from the proposition that the proper approach was to state objectives and policies and to then design methods (including rules) to implement those objectives and policies. It decided that if a reference seeks to introduce rules which are inconsistent with existing objectives and policies it could not succeed unless the submission included appropriate new objectives and policies. On the Court's analysis there was nothing in the transitional plan objectives and policies capable of justifying the rules sought in the references. And it found that no new objectives and policies had been proposed in the submission, an omission which it considered was not capable of remedy by the production of objectives and policies at the hearing. Thus the references were rejected on the basis that the Court did not have jurisdiction.

[22] For the appellants Ms Steven emphasised that the plan under consideration is a thoroughly out of date transitional plan which had not been prepared under the Resource Management Act. Under those circumstances, she submitted, it was

especially important for the Court to determine the compatibility of the proposed rules with the objectives and policies and the implications of any incompatibility on the merits rather than as a matter of jurisdiction. Ms Steven indicated that she had not been able to locate any other instance where, faced with a reference to a transitional plan, the Environment Court had rejected the reference on purely jurisdictional grounds.

[23] At least within the context of a transitional plan the rigid proposition that the Court should reject a reference *on purely jurisdictional grounds* if the rules proposed in the reference are inconsistent with the objectives and policies in the plan would appear to be suspect. Several factors count against it. First, its rigidity. If the proposition is sound it would logically have to apply on all occasions regardless of the degree of inconsistency. Secondly, if a reference complies with clause 14(1) of the first schedule, then prima facie clause 15(1) of the first schedule entitles the referrer to a hearing into the provision or matter referred. In other words, the referrer is entitled to a determination on the merits. Finally, the proposition does not sit comfortably with the realities of a transitional plan which has not been prepared under the Resource Management Act and is nothing more than a transitional mechanism. Transitional plans cannot be expected to reflect the cohesion and precision that might be expected of a plan prepared under the Resource Management Act. There have even been instances where the Environment Court has declined to give any weight to some transitional objectives and policies because they were so out of place in the context of the Resource Management Act : see, for example, *Atkins v Whangarei District Council* (A6/2000) and *McKay v Whangarei District Council* (A5/2000).

[24] Probably the Environment Court did not intend to introduce a rigid proposition along the lines discussed in the previous paragraph. There is some merit in the point made by Mr Smith and Ms Perpick that despite the Court's indication that it was rejecting the references because it did not have jurisdiction and that it had not considered the merits, the decision has many of the trappings of a decision on the merits. This is particularly so in the case of its initial conclusion that nothing in the specific objectives and policies in the transitional plan (as amended by the change) was capable of justifying rules of the type sought by the referrers. That conclusion involved a detailed analysis of the relevant objectives and policies as well as consideration of counsels' submissions. The Court's conclusion that the scheme reflected by the plan was *"clear and unambiguous"* and that the objectives and policies are so inflexible that they effectively direct the content of methods of implementation (including rules) was probably inevitable.

[25] It seems to be implicit in the next phase of the Court's reasoning that if the rules proposed in the reference could not be justified by objectives and policies the Court would be entitled to reject the reference on purely jurisdictional grounds without considering the merits. For reasons already expressed I doubt that such an approach is justified, at least in situations where the instrument is a transitional plan. In this instance, however, the fact that the Environment Court seems to have dealt with the matter on a purely jurisdictional footing has probably not materially affected the outcome to this point. Obviously the Court has seen the matter in very black and white terms along the lines that given the total absence of relevant objectives and policies in the plan, the proposed rules could not be contemplated unless appropriate objectives and policies could be introduced via the references. While the Court may

have taken a short cut in reaching that conclusion, it has nevertheless obviously given that aspect careful consideration and I am not satisfied that its conclusion would have been any different if it had dealt with that aspect on the merits.

[26] To this point no case has been made out for the conclusions reached by the Environment Court to be revisited. On the other hand, it seems to me that there is substance in the appeal to the extent that it relates to the final phase of the Court's reasoning, namely, its conclusion that the appellants' submissions had not suggested any new objectives and policies which were capable of saving the proposed rules. That conclusion must stand or fall on the submissions and references lodged by Mr and Mrs Shaw and the Halswater group.

[27] In their submission Mr and Mrs Shaw sought (by way of various alternatives) reductions in subdivisional lot size coupled with the right to erect a dwelling. They also sought:

> *"(f) Any necessary amendments to objectives and policies".*

On my reading of the overall request for relief, this request for any necessary amendments to objectives and policies applies to all earlier alternatives, not only to the request for relief under paragraph (d). This follows from the fact that the immediately preceding paragraph (e) expressly refers to *all* the earlier alternatives. While the reference uses different wording and in some respects it might be argued that the relief therein goes beyond the scope of the submission, there can be no such suggestion in the case of the request for consequential orders amending the objectives and policies which is plainly within the scope of the corresponding request in the submission.

[28] As already discussed, only the request by the Halswater group for site specific subdivision down to an allotment size of 5,000M^2 coupled with the right to erect a dwelling survived the Court's first decision. Supplementary relief was also sought in the submission and reference. In the submission the request was for:

> *"(v) Such other consequential and incidental amendments, deletions, or additions to the ... objectives and policies ... as may be necessary or expedient to give effect to the purpose and intent of the decisions sought in the above paragraphs."*

This request was repeated in the reference. There was some suggestion that the Court's first decision had effectively struck out the request for supplementary relief. I do not believe that was the intention of the Court. The request for supplementary relief was severable and there was no reason for it to have been struck out. Accordingly I proceed on the footing that the requests for supplementary relief in the submission and reference survived the Court's first decision.

[29] It can be seen that neither the submissions or references attempted to actually formulate specific objectives and policies. The introduction of specific objectives and policies during the course of the hearing attracted adverse comment from the Court. Ms Steven argued, however, that the objectives and policies presented at the hearing were reasonably and fairly within the scope of the original submissions and references and should not have been disregarded by the Environment Court.

[30] As Panckhurst J commented in *Royal Forest and Bird Protection Society v Southland District Council* [1997] NZRMA 408 at 413 (HC):

> *"... it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety." [Emphasis added].*

One of the underlying purposes of the submission process is to ensure that the relevant local authority and all other potentially interested parties are sufficiently informed about the relief sought by the submitter. In *Haslam v Selwyn District Council* (1993) 2 NZRMA 628, 634 the Planning Tribunal employed the test:

> *"... whether the amendment ... is such that any person who did not lodge a submission would have done so if the application information available for examination had incorporated the amendment."*

When determining whether the underlying purpose of the submission process has been met the Courts have consistently concentrated on substance rather than form.

[31] The Environment Court reached the conclusion that:

> *"... no new objectives and policies were suggested in either referrers' submission."*

Although it is true that no new objectives and policies were actually formulated in either referrers' submission, there can be little doubt that both submissions signalled that the relief package was intended to include such modification to the objectives and policies as might be necessary to support the proposed rules. In my opinion the *"workable"* approach discussed by Panckhurst J required the Environment Court to take into account the *whole* relief package detailed in each submission when considering whether the relief sought had been reasonable and fairly raised in the submissions. Given the nature of the proposed rules I cannot conceive that anyone could have been under any illusion that the submissions were seeking not only a reduction in lot size (and associated relaxation in relation to dwellings) but also any necessary modification to the objectives and policies. In other words, I do not think that anyone could justifiably complain that they would have lodged a submission if they had been aware that the referrers were seeking amendments to the objectives and policies. They were on notice that such amendments were contemplated.

[32] I note that a somewhat similar issue arose in *Telecom New Zealand Ltd v Manawatu Wanganui Regional Council* (RMA 265/95) where a relatively broad brush approach had been adopted in the submission and reference in relation to objectives and policies. Despite this lack of specificity the Environment Court concluded that no one had been disadvantaged and that it had jurisdiction to hear the appeal on its merits. In contrast to that approach it seems to me that on this occasion the Environment Court adopted an unduly narrow approach when it reached its conclusion that no new objectives had been suggested by either referrer.

[33] At the hearing the referrers were entitled to provide more detail about the proposed objective and policies, but that did not entitle them to go beyond the scope of the packages signalled in their submissions and references. If on reconsideration of this matter on the merits the Environment Court decides that the references have merit it would, of course, be entitled to cut back the amendments proposed in Exhibit 12.1 to ensure that the modified objective and policies were not wider than was absolutely necessary to support the rules.

[34] One final matter. The Environment Court noted that Mr and Mrs Shaw were seeking to have objectives and policies that would fit the rules proposed by them whereas under the Resource Management Act the proper approach is to first state the objectives and policies and then to design methods to implement those objectives and policies (see s75(1)(b)(c) and (d)). Undoubtedly the Court's observation is technically right. But I did not understand the Court to be suggesting that a reference could be rejected on the basis of that technicality. In my opinion any such suggestion

would cut across the non-legalistic approach described by Panckhurst J in *Royal Forest and Bird Protection Society v Southland District Council.*

[35] Summary: I reject the appeal arising from the Shaw and Halswater group references except to the extent that the Court has concluded that those references should not be considered on their merits because no new objectives or policies had been proposed in the submissions. The Environment Court is to reconsider those references on their merits on the basis that new objectives and policies *were* suggested in the submissions and references.

Outcome

[36] The appeal is allowed in part. The Environment Court is to reconsider the relief sought in paragraphs (a), (b) and (d) of the Applefields reference on the merits. The Shaw and Halswater group references are also to be reconsidered on the merits on the basis that a new objective and new policies were suggested in the submissions and references. Leave is reserved to any party to apply further should any clarification of these orders become necessary. If the parties are unable to reach agreement as to costs they may submit memoranda for consideration.

Tobin Holm J

Delivered at 11 am/pm on 19 March 2001.

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Buddle Findlay, Christchurch for Respondent
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