CASE NOTE: *PROTECT AOTEA v AUCKLAND COUNCIL* [2022] NZHC 1428

INTRODUCTION

Initiatives to increase Tāmaki Makaurau's shipping capacity to match local and national population growth have not lacked contention. Reclamation efforts in particular have captivated public interest, whilst seabed dredging proposals, and associated sediment dumping, to maintain (maintenance dredging) or deepen (capital dredging) existing shipping channels to cater for larger ships, have been no less polarising. Groups such as Protect Aotea have been particularly vocal in advocating for ecological and mana whenua concerns, while Ports of Auckland Ltd (POAL) has suggested many of these concerns are overstated.

In considering an application for dumping consent in 2019, the Environmental Protection Authority (EPA) largely agreed with POAL, granting consent under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 consent enables POAL to dump dredged material at the Cuvier Disposal Site (CDS) outside New Zealand's territorial sea (and so outside the Coastal Marine Area (CMA) to which the Resource Management Act 1991 applies), but within New Zealand's Exclusive Economic Zone (EEZ). Protect Aotea and Protect Our Gulf applied for judicial review of the EPA's dumping consent decision.

In 2020, POAL separately applied for resource consents to conduct both maintenance and capital dredging inside the CMA. The consents were granted by Auckland Council and appealed to the Environment Court by Protect Aotea and Protect our Gulf. In a preliminary decision, the Environment Court found that the effects of dumping material outside the CMA had a sufficient nexus to, and were thus within the scope of, the actual/potential effects on the environment of allowing the dredging activities. However, as there was a "sufficient" consent under a comparable consenting regime for the dumping activity, this precluded any competing assessment of those matters by a consent authority under the Resource Management Act 1991, and POAL's marine dumping consent formed part of the existing environment (*Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [87]-[88]). Protect Aotea appealed this decision to the High Court. POAL cross-appealed.

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In a decision that provides useful analysis of the relationship between the Resource Management Act 1991 and other legislative regimes, and of the distinction between the existing environment and permitted baseline concepts, the High Court (Gault J) dismissed the appeal and cross-appeal, finding that the Environment Court did not err in deciding that the dumping and its effects are relevant to the proposed dredging activities, being connected and proximate to them, nor in deciding that POAL's marine dumping consent forms part of the existing environment (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [124]-[125]).

THE APPEAL AND CROSS-APPEAL

On appeal, Protect Aotea argued that there was no basis for treating the dumping consent as part of the existing environment because the dumping consent would not be exercised without the dredging consent (this was disputed by POAL), and it did not form part of the permitted baseline because that does not apply to consents, let alone Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 consents. POAL's cross-appeal related to the manner in which the Environment Court had arrived at its assessment of the existing environment.

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THE HIGH COURT'S DECISION

Question 1 – can the effects of dumping be taken into account?

The Environment Court held that the effects of dumping material outside the CMA were within the scope of the actual and potential effects on the environment of allowing the CMA dredging activities, because they were "connected and proximate" (*Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [88]). POAL's cross-appeal challenged this conclusion on the basis that the Environment Court erred by failing to consider whether the nexus was broken where the volume of material that could be dumped equated to the volume for which POAL already holds maintenance dredging consents. The challenge was unsuccessful. The Environment Court had considered nexus, including in a "but for" sense, and made a factual finding on proximity. This was not a case where there was no evidence to support the Environment Court's factual finding (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [60]).

The High Court next turned to the argument by Protect our Gulf, a party supporting Protect Aotea's appeal, that the dumping effects were not "sufficiently" addressed by an "equivalent" consent (the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 dumping consent). Protect Our Gulf noted relevant differences between the regimes, as identified in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 – namely the lack of equivalence in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 to ss 6 and 7 of the Resource Management Act 1991, and the limited provision of rights of participation in EEZ dumping applications. The High Court observed that the Environment Court had acknowledged those differences, which were considered insignificant, and held there was no error in conducting a regulatory gap analysis or in finding that Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 consents should be treated as comparable to those under the Resource Management Act 1991 (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [61]-[68]).

POAL, whilst in agreement with the outcome, suggested that the dumping effects should be precluded from consideration not because there was a "sufficient" consent, but simply because of the existence of an "equivalent" consenting regime to the Resource Management Act 1991, which POAL argued broke the nexus between dumping and dredging activities (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [71]). Protect Aotea took issue with the preclusion of re-assessment, suggesting that the existence of a separate "equivalent" regime, and any consent granted under it, should not be determinative. After all, consent authorities can take account of maritime safety effects, or effects on historic heritage, even though those issues are matters also addressed in other regimes and by other bodies (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [72]). In fact, as was the case in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, consideration of the effects of an EEZ activity often requires a thorough consideration of the activity's effects in the CMA. By "parity of reasoning", that same level of consideration should be required for an activity in the CMA with effects in the EEZ (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [76]).

The High Court disagreed with much of Protect Aotea's analysis of this issue, noting that some of Protect Aotea's examples where approval for activities was required under other legislative regimes could be distinguished (in that those different regimes were not equivalent to the Resource Management Act 1991) and finding that *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127 could be differentiated in that the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 requires explicit consideration of "the nature and effect of other marine management regimes" including the Resource Management Act 1991 (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [82]). However, the Court rejected POAL's proposition. The existence of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 does not itself legally prevent a consideration of consequential effects in the EEZ when assessing an application for resource consent under the Resource Management Act. An approach that treats the EEZ consent as part of the existing environment, rather than treating the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 regime as breaking the nexus as a matter of law, has the advantage of enabling the Resource Management Act 1991 consent authority and the Environment Court on appeal to consider the scope of the particular consent and if it is likely to be given effect to (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [89]).

Question 2 – Are the dumping effects part of the receiving environment or permitted baseline?

The Environment Court held that a re-assessment of all dumping effects (relating to both the dumping of material from maintenance and capital dredging) under the Resource Management Act 1991 was precluded because the marine dumping consent formed part of the receiving environment (*Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [87]-[88]). Protect Aotea appealed this finding. By way of cross-appeal, POAL submitted that if the Environment Court was wrong, it should have at least included the effects of the dumping of *maintenance* material in the receiving environment and disregarded the effects of the dumping of *capital* material using the permitted baseline concept (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [54]-[60].

A The receiving environment

Queenstown Lakes District Council v Hawthorn Estate Ltd [2006] NZRMA 424 (CA) provides that an unimplemented consent can be treated as part of the receiving environment if it is likely to be implemented. Given the similarities between the Resource Management Act 1991 and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 consenting regimes, the High Court accepted that the marine dumping consent could be part of the existing environment if it was likely to be implemented. Protect Aotea suggested that the part of the dumping consent relating to the much larger volume of capital dredged material was not likely to be implemented without approval of the CMA capital dredging consent, and thus could not form part of the receiving environment. The High Court accepted that dumping of spoil from maintenance dredging would be (and was being) implemented, where-as dumping capital dredged spoil was dependent on the dredging consent being granted but held there was no error (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [123]-[124]). While the Environment Court had concluded that the marine dumping consent formed part of the existing environment without explicitly addressing whether the dumping consent was likely to be implemented, that assessment is a question of fact. As such, on appeal the question could only be whether the Court's conclusion that POAL's marine dumping consent forms part of the existing environment is one to which it could not reasonably have come; an issue "not well suited to a s 299 appeal" (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [107]). It is implicit in the High Court's decision that this high hurdle was not reached.

B The permitted baseline

Through its cross-appeal, POAL submitted that the environmental effects authorised by the dumping consent – in particular the effects of dumping *capital* material – can be disregarded under the permitted baseline, because the permitted baseline applies to make effects generated by permitted or consented activities irrelevant. While Resource Management Act 1991, s 104(2) did not apply, POAL argued that was only a partial codification of the common law permitted baseline (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [112], [117]). The High Court rejected any application of the permitted baseline, noting it applies to the site that is the subject of the resource consent application, and to activities permitted in a national environmental standard or plan. Even if Resource Management Act 1991, s 104(2) modified rather than supplanted the common law permitted baseline, the effect of Resource Management Act 1991, s 104(2) was that disregarding permitted effects became discretionary. Whether the permitted activity is fanciful is relevant to that discretion. That is a different threshold. At least in relation to the receiving environment (beyond the subject site), the Court considered there to be:

> *…no further category whereby the adverse effects of an activity that has been consented, but the consent is unimplemented, can be disregarded under the permitted baseline where implementation is not fanciful, rather than as part of the existing environment under Hawthorn where the appears likely to be implemented threshold applies … the effects of the consequential activities of disposing capital and maintenance dredging material should not be treated differently so that the effects of disposing capital dredging, if they could not be disregarded as part of the 'environment', can be disregarded using the permitted baseline on the basis that the dumping permit will be utilised to dispose of the capital dredging if consent is granted. … the permitted baseline is simply an analytical tool that excludes from consideration certain effects of developments on the site that is subject to a resource consent application. It is not*

> *to be applied for the purpose of ascertaining the future state of the environment beyond the site [Protect Aotea v Auckland Council [2022] NZHC 1428 at [122]].*

In any event, the High Court noted that the application of a permitted baseline is discretionary. The Environment Court did not consider the permitted baseline, and it was not a ground of the cross-appeal that the Environment Court failed to do so (*Protect Aotea v Auckland Council* [2022] NZHC 1428 at [123]).

CONCLUSION

The High Court in *Protect Aotea* had to grapple with the distinction between questions of fact and law arising in the context of existing environment and permitted baseline concepts. The decision affirmed the proposition that effects which are experienced outside the boundaries of the Resource Management Act 1991's jurisdiction can fall within the scope of Resource Management Act 1991 consideration as actual/potential effects on the environment where there is sufficient nexus. However, where sufficient nexus is factually established, where the effects are "sufficiently" addressed by a consent under an "equivalent" consenting regime, such a consent (and its effects) can be considered part of the receiving environment where that consent is 'likely to be implemented'. Those effects would not form part of the permitted baseline as they do not occur on the application site.