IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 46/2023
[2023] NZSC 108

BETWEEN	THE CANYON VINEYARD LIMITED Applicant
AND	CENTRAL OTAGO DISTRICT COUNCIL First Respondent
	BENDIGO STATION LIMITED Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: L A Andersen KC for Applicant
D J Anderson for First Respondent
P J Page and S R Peirce for Second Respondent

Judgment: 17 August 2023

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is dismissed.

B The applicant must pay both the respondents costs of $2,500.

REASONS

Introduction

[1] Bendigo Station Ltd (Bendigo) owns a large farming property in Central Otago. It sought resource consent to subdivide an area of its land. The Canyon Vineyard Ltd (Canyon) owns land to the west of Bendigo's land where it operates, among other things, a vineyard, restaurant and function centre. It opposed Bendigo's application for the subdivision consent.

[2] The Central Otago District Council (the Council) granted consent to the creation of 12 lots, with consents for residential building platforms on eight of them. Canyon appealed against that decision to the Environment Court. That Court upheld the Council's decision but for a slightly amended proposal.[1] Canyon's appeal to the High Court against the Environment Court's decision was dismissed.[2]

[3] Canyon's application for leave to appeal against the High Court decision was declined by the Court of Appeal on 23 March 2023.[3] Canyon now seeks leave to appeal directly to this Court against the High Court decision.

[4] Canyon's grounds of appeal are broadly similar to those raised in the Courts below, although now narrowed to two alleged errors of law:

(a) the alleged failure by the Environment Court to consider evidence on kaitiakitanga presented by Mr Johnston, the sole director and shareholder of Canyon; and

(b) an alleged error by the Environment Court and the High Court in their assessments of effects in light of Objective 4.3.3 of the Central Otago District Council Plan (the Plan) to "maintain and where practical enhance rural amenity values".

Jurisdiction

[5] The Council submits that this Court has no jurisdiction to entertain this application. That is because appeals of High Court decisions under s 299 of the Resource Management Act 1991 (RMA) are governed by Subpart 8 of Part 6 of the Criminal Procedure Act 2011 (CPA), with necessary modifications.[4] Pursuant to

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1 The interim decision granted the resource consents: *The Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 136 (Judge Steven and Commissioner Mabin) [Preliminary EnvC judgment]. The subsequent decision was in response to a direction to the parties to confer on the amended conditions of the subdivisions: *The Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 187 (Judge Steven and Commissioner Mabin).

2 *The Canyon Vineyard Ltd v Central Otago District Council* [2022] NZHC 2458 (Doogue J) [HC judgment].

3 *The Canyon Vineyard Ltd v Central Otago District Council* [2023] NZCA 74 (French and Mallon JJ) [CA judgment].

4 Resource Management Act 1991, s 308.

ss 303 and 304 of the CPA a party to a High Court decision under s 299 of the RMA is able to instigate a second appeal in either the Court of Appeal or the Supreme Court. In this case, Canyon chose to appeal to the Court of Appeal. The exception to s 69(a) of the Senior Courts Act 2016 is, therefore, in the Council's submission, engaged. The Council submits that another enactment provides, in the circumstances of this case, that there is no right of appeal against the High Court decision.

[6] Even if there were jurisdiction, the Council submits that there must, under s 75 of the Senior Courts Act, be exceptional circumstances that justify taking a proposed appeal directly from the High Court to this Court.[5] As pointed out by Bendigo, this is a very difficult barrier to overcome where the Court of Appeal has already declined leave in a fully reasoned judgment.[6]

Kaitiakitanga

[7] In its decision declining the application for leave to appeal on this point, the Court of Appeal pointed out the Environment Court had determined in its interim decision that the appeal was limited to the visual impacts of certain of the proposed lots and the implications of the effects of the proposal within the framework of the Plan. In that context, Mr Johnston was entitled to express his personal views of the rural amenities but these were necessarily subjective. They needed to be objectively tested for reasonableness. The expert evidence about visual effects was that these were no more than minor.[7]

[8] The Court of Appeal noted that the High Court held that, on the facts, independent evidence was needed that kaitiakitanga required the land to remain unspoilt. This was because Mr Johnston's evidence conflicted with his earlier actions. Mr Johnson had agreed, when purchasing the Canyon land, that he would not oppose development on the Bendigo land. In any event, the High Court said that, even if there had been an error in the Environment Court's approach to Mr Johnston's evidence, it

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5 The criteria for leave to appeal under s 74 of the Senior Courts Act 2016 must also be met.

6 *Burke v Western Bay of Plenty District Council* [2005] NZSC 46 at [4]; and *Te Whānau a Kai Trust v Gisborne District Council* [2023] NZSC 77 at [9].

7 CA judgment, above n 3, at [9], citing Preliminary EnvC judgment, above n 1, at [29], [44], [171]–[172] and [179].

had not been demonstrated that this would have been material to the ultimate outcome.[8]

[9] The Court of Appeal held that in this case the evidence had been considered and rejected in the Courts below for reasons that were explained and that did not give rise to an error of law.[9]

Rural amenity values

[10] The Court of Appeal in its leave decision said that the Environment Court in its interim decision held that the word "maintain" allowed a Council to protect rather than to preserve or enhance and that to protect means to keep safe from harm or injury.[10] What the policy did not say was that adverse effects should simply be avoided.[11]

[11] The Environment Court noted that Objective 4.3.3 stated that rural amenity values are created by the "open space, landscape, natural character and built environment values of the rural environment". It was relevant to the assessment of amenity values that this land was in the category of Other Rural Landscape (ORL) and was not an Outstanding Natural Landscape, Significant Amenity Landscape or Significant Natural Area.[12] The Environment Court accepted the evidence of two experts that the rural amenity values of Canyon's function centre would be maintained and that the development on Bendigo's land would be compatible with the surrounding environment.[13]

[12] The Court of Appeal noted that the High Court upheld the Environment Court's view that the "rural amenity values" in an ORL included the built environment and that the proposal was compatible with the surrounding environment, including the visual amenity value at Canyon's Function Centre.[14]

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8 CA judgment, above n 3, at [10], citing HC judgment, above n 2, at [174]–[176].
9 CA judgment, above n 3, at [12].
10 At [19], citing HC judgment, above n 2, at [147] and *Port Otago Ltd v Dunedin City Council* EnvC Christchurch C004/02, 22 January 2002 at [41].
11 CA judgment, above n 3, at [19], citing HC judgment, above n 2, at [148] and *Harris v Central Otago District Council* [2016] NZEnvC 52 at [32].
12 CA judgment, above n 3, at [20], citing Preliminary EnvC judgment, above n 1, at [152].
13 CA judgment, above n 3, at [24], citing Preliminary EnvC judgment, above n 1, at [178]–[181].
14 CA judgment, above n 3, at [27]; and HC judgment, above n 2, at [134]–[135].

[13] The Court of Appeal held it was not arguable that the incorrect test was applied by the Courts below. Canyon's view that the rural amenity values were negatively impacted by any visible building on the site reflected a misunderstanding of the Plan.[15]

Our assessment

[14] We do not need to deal with the RMA jurisdiction point, given that Canyon clearly fails the test in s 75 of the Senior Courts Act. There are no exceptional circumstances justifying the application for leave to appeal to this Court, particularly in light of a full and detailed leave judgment from the Court of Appeal.

[15] In any event, we do not consider that the application would meet the test in s 74 of the Senior Courts Act. While the issue of the approach to kaitiakitanga and the proper interpretation of Plans could be matters of general or public importance, this case rests purely on the particular circumstances of the case. Further, nothing raised by Canyon suggests a risk of a miscarriage of justice.[16]

[16] Canyon's application is out of time.[17] An extension of time for filing that application would therefore be required. We assume that Canyon, by filing the application, is also applying for an extension of time. As leave would not be granted, there is no point in granting such an extension.

Result and costs

[17] The application for an extension of time to apply for leave to appeal is dismissed.

[18] As both respondents filed full submissions on this application, they are each entitled to costs.

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15 CA judgment, above n 3, at [30].

16 For what is required for miscarriages in civil cases see: *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

17 Because Canyon's application for leave to appeal was declined, technically the time for leave to appeal should be taken from the date of the High Court's judgment: 27 September 2022. However, even if calculated from the Court of Appeal's refusal of leave, Canyon's application was still out of time, although it is noted that counsel gave reasons for the three-week delay in its Notice of Application for Leave to Appeal.

[19] The applicant must pay both the respondents costs of $2,500.

Solicitors:
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Mactodd Lawyers, Queenstown for First Respondent
Gallaway Cook Allan Lawyers, Dunedin for Second Respondent