

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 37/2019
[2019] NZSC 73**

BETWEEN

AND

VIPASSANA FOUNDATION
CHARITABLE TRUST BOARD
Applicant

AUCKLAND COUNCIL
First Respondent

RAYMOND MYLES O'BRIEN AND
VICTORIA MEI SIEN PICHLER
Second Respondent

AUCKLAND SHOOTING CLUB
INCORPORATED
Third Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: S J Ryan for Applicant
N M H Whittington and P I C Comrie-Thomson for
First Respondent
J M Savage for Second and Third Respondents

Judgment: 12 July 2019

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Costs of \$2,500 are awarded to the respondents.**
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REASONS

Background

[1] An outdoor shooting range was granted a certificate of compliance by the first respondent, Auckland Council (the Council), under s 139 of the Resource

Management Act 1991. The site of the shooting range was about 1.2 kilometres from the meditation centre of the applicant, the Vipassana Foundation Charitable Trust Board (the Trust).

[2] The Trust sought judicial review of the Council's decision, claiming the shooting range did not comply with the relevant district and regional plan provisions.

[3] In brief, the High Court found there were flaws in the application and remitted the matter to the Council to be reconsidered but did not quash the certificate of compliance.¹ The Council duly reconsidered the application and reconfirmed its decision.²

[4] On appeal to the Court of Appeal, the Trust's appeal was allowed and the certificate of compliance was set aside.³

[5] One of the Trust's complaints in the judicial review proceedings related to the applicability (or otherwise) of the noise standards in the District Plan to gunfire.⁴ It was also alleged that the acoustic reports of the noise experts (Marshall Day Acoustics) relied on by the Council were flawed. Indeed, in an amended notice of appeal filed in the Court of Appeal the Trust sought a declaration that the Marshall Day Acoustics reports could not validly certify compliance with the noise limit rule in the District Plan for the sound of gunfire.

[6] The Trust's arguments on the noise issues were rejected both by the High Court⁵ and the Court of Appeal.⁶

¹ *Vipassana Foundation Charitable Trust Board v Auckland Council* [2017] NZHC 1457, [2017] NZRMA 339 (Whata J) [*Vipassana* (HC)] at [76]. Whata J afforded the parties an opportunity to be heard on relief. He issued a judgment two days later confirming that the matter would be remitted to the Council to be reconsidered but that the certificate would not be quashed: *Vipassana Foundation Charitable Trust v Auckland Council* [2017] NZHC 1492, [2017] NZRMA 313.

² The reconsideration took place in two stages: see *Vipassana Foundation Charitable Trust Board v Auckland Council* [2019] NZCA 100, [2019] NZRMA 380 (Cooper, Gilbert and Williams JJ) [*Vipassana* (CA)] at [22].

³ *Vipassana* (CA), above n 2, at [100]–[101].

⁴ The Auckland Council District Plan: Operative Rodney Section 2011 (the District Plan). This has now been replaced by the Auckland Unitary Plan.

⁵ *Vipassana* (HC), above n 1, at [65]–[72].

⁶ *Vipassana* (CA), above n 2, at [41]–[54].

Application for leave

[7] The Trust seeks leave to appeal on the basis that the Court of Appeal erred in its assessment of compliance with noise standards and that it was wrong not to grant the declaration sought.

[8] The Trust submits that the issue is of general and public importance⁷ because the acoustic rules in question are similar to those in other district plans throughout New Zealand. It is also of general importance to the parties in the context of future applications by the second respondent for use of land for shooting activities.

The Council's position

[9] The Council opposes the application for leave.⁸ It submits that leave should not be granted because the Trust succeeded before the Court of Appeal and the certificate of compliance was set aside. In addition, the relevant part of the District Plan is no longer operative. Further, it is submitted that the purpose in pursuing the appeal is the private interest of obtaining a strategic advantage in a future resource consent process. Finally, the Council submits that there were also concurrent findings on the noise issue in the Courts below.

[10] The Council submits that the likely precedential effect of the Court of Appeal's decision should not be overstated. The Council accepts that, while the standards in the plan at issue are similar in many plans across New Zealand, how the standards should be interpreted and implemented may differ across plans.

Our assessment

[11] The Trust succeeded in the Court of Appeal in having the certificate of compliance set aside. The cases do appear to recognise that there might be exceptional

⁷ Senior Courts Act 2016, s 74(2)(a).

⁸ The second and third respondents abide the decision of the Court.

circumstances where this Court may entertain an appeal from a party who succeeded in the Court below.⁹

[12] We do not, however, consider this case is one where it would be appropriate to entertain an appeal. This is despite the Trust not succeeding on its application for a declaration. We accept the Council's submission that the substance of the Trust's case (including the noise level declaration) related to the validity of the certificate of compliance. That has been set aside and any new process will be in relation both to new applications and a different plan.

[13] In any event, the issues are narrow points and arise in relation to a particular context: the application of noise standards to gunfire and in the context of a shooting range. There are concurrent findings in the Courts below. There is an issue therefore as to whether the application would meet the leave criteria,¹⁰ even if the Trust had not succeeded before the Court of Appeal.

Result

[14] The application for leave to appeal is dismissed.

[15] Costs of \$2,500 are awarded to the respondents.

Solicitors:

Pidgeon Law, Auckland for Applicant

Meredith Connell, Wellington for First Respondent

Blackwells, Auckland for Second and Third Respondents

⁹ *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25]; *Right to Life New Zealand v Abortion Supervisory Committee* [2012] NZSC 68, [2012] 3 NZLR 762 at [50]; and *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2013] NZSC 35, [2013] 2 NZLR 397 at [3]–[4]. Compare *Re Greenpeace of New Zealand Inc* [2013] NZSC 12, (2013) 26 NZTC 21-005 where leave to appeal was granted because Greenpeace had only been partially successful and the Court of Appeal had referred the matter back to the relevant decision-maker for reconsideration in light of the Court of Appeal's judgment.

¹⁰ Senior Courts Act 2016, s 74.