Basin Bridge – The Final Nail?

On 21 August 2015, the High Court released its decision on the appeal from the Board of Inquiry in relation to the Basin Bridge Project (New Zealand Transport Agency v Architectural Centre Inc & Ors [2015] NZHC 1991). Led by the New Zealand Transport Agency, the Bridge Project was to construct, operate and maintain a two lane one-way bridge on the north side of the Basin Reserve in Wellington. In June 2013, NZTA lodged a Notice of Requirement and applications for incidental resource consents for the Bridge Project.

In August 2014 the Board of Inquiry appointed under section 149J of the Resource Management Act 1991 (*RMA)* to hear and determine the application released its decision, rejecting the application.

Question of Law

In September 2014 NZTA appealed against the decision but was restricted by section 149V to appealing only based on questions of law. Categorising them into eight "issues", NZTA lodged a total of 34 questions of law in its notice of appeal. Perhaps unsurprisingly, the judgment begins by offering a reflection on what the Court's role is under section 149V and more generally, what amounts to a question of law. ***As pressure to streamline RMA processes increases and restricting appeals to points of law becomes increasingly common place, the Court's reflections are particularly pertinent.***

The Court cited two New Zealand Supreme Court cases at length – *Vodafone New Zealand Limited v Telecom New Zealand Limited*[1] and *Bryson v Three Foot Six Limited.*[2] Applying these authorities, the Court reflects that it is not the High Court's role to undertake an "on merits" consideration of whether the Board's conclusion was correct, nor to decide if the Bridge Project would be the best outcome to address the congestion problem at the Basin Reserve. Instead its role is two-fold:

1. to ensure the fact-finding Court (in this case, the Board) has not overlooked any relevant matter or taken into account some matter which is irrelevant to the proper application of the law; and/or
2. to ensure that the determination does not contradict the true and only

reasonable conclusion available on the facts.

Questions of law must therefore be framed in strict view of these roles.

On the first point, the Court focuses squarely on the degree of consideration of the matter which is required by the RMA. In other words, it must essentially be a question of whether the fact-finding Court has considered the *matters required* to the *degree required* by *statute.* Where the fact-finding Court meets its statutory obligation in this regard, the Court will not entertain arguments that it should have in fact placed greater weight than what is required under the RMA.

On the second point, the Court emphasises the "high hurdle" faced by an appellant in seeking to assert that the true and only reasonable conclusion contradicts the determination. In doing so, it rejects the formula of "a conclusion [the tribunal] could not have reasonably come to", particularly because when reframed without the negative, the question becomes: is the conclusion one to which a tribunal could reasonably have come on the evidence? The High Court determined that posing the question in this manner risks *"extending the inquiry beyond the proper boundary of what constitutes a question of law"* and inviting a more meritorious inquiry. Instead the Court adopts the wording used in *Edwards v Bairstow*[3] whereby an appellant must establish that the decision maker exercised its judgment in a way that "*contradicts the true and only reasonable conclusion available on the facts*."

The Court is particularly strong on this issue of what amounts of a question of law – so much so that it rewords many of NZTA's questions to properly reflect the correct roles of the Court (identified above). As well as offering very useful guidance on this issue, this case is also a warning for those seeking to appeal on questions of law (particularly in the resource management context). The scattergun approach to questions taken by NZTA was not well regarded by the High Court and its reaction serves as a reminder that ***fewer carefully crafted questions framed squarely in view of the limited nature of the Court's role on appeal will be more effective than many questions drafted to disguise dissatisfaction with the conclusions to which the decision-maker has come, rather than whether or not its discretion was exercised within the bounds of the law.***

King Salmon and Notice of Requirements

On appeal, NZTA sought to assert that the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Limited* had significantly changed the way "subject to Part 2" is interpreted, whereby Part 2 is only relevant if one of the three caveats in *King Salmon* is established or there is a conflict in the exercise of the statutory duty under section 171(1)(a) – (d). In other words, because (as expressed in *King Salmon)* Part 2 provisions are particularised by the planning documents already, there is no need to refer back to them to make an overall judgment.

In response, the Court distinguishes *King Salmon* relying on the distinction between the Court's requirement in *King Salmon* to "give effect" to the New Zealand Coastal Policy and its requirement in the present case to have particular regard to planning documents. In *King Salmon,* the plan change had to give effect to (or be framed by)

the NZCPS which the Supreme Court considered should already provide for Part 2, while under section 171, *Part 2* forms the framework within which consideration of the environmental effects must occur, having particular regard to the matters in (a) – (d).

In reaching its conclusion, the Court sought to categorise *King Salmon* as a case where the application of Part 2 was already provided for in a particular way. By inference, ***there will only be a narrow set of circumstances in which a decision maker will not be entitled to, by reference to the principles in Part 2, carry out a balancing exercise of all relevant interests to reach a decision.*** Apart from in these instances, the overall broad judgment evaluation remains the preferred approach to Part 2.

Concluding Issues

The Court also addressed a number of other points raised by the NZTA including whether and in what circumstances an enabling effect can be given weight under section 171 and section 5, the degree of consideration to be given to alternative options under section 171(1)(b), and whether issues of *heritage and amenity* are to be limited to those captured by the relevant District Plan.

In summary, NZTA failed to establish that that the Board had made any of the errors of law alleged and consequently the appeal under section 149V(1) was dismissed. As a final avenue, NZTA may appeal the decision to the Supreme Court but as at 25 August 2015, no decision has yet been publicised. However since the decision was released, Prime Minister John Key has continued to emphasise NZTA's strong preference for the Basin flyover option as the most viable solution to the congestion issues around the Basin Reserve. On that basis, despite the fairly decisive decision of the High Court, NZTA may consider an appeal to the Supreme Court worthwhile.

Footnotes:
1. [2011] NZSC 138 at [50].
2. [2005] NZSC 34.
3. [1956] AC 14 (HL) at 36.