IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 11/07

BETWEEN	**THE RAROTONGAN BEACH RESORT & SPA LIMITED** Appellant
AND	**TERI TEPA, IAN FORBES & MOEHAU IRVING** First Respondents
AND	**NATIONAL ENVIRONMENT SERVICE** Second Respondent
AND	**ISLAND ENVIRONMENT AUTHORITY FOR RAROTONGA** Third Respondent

Coram:	Barker JA (Presiding) Henry JA Paterson JA
Counsel:	Mr Paul David and Mr Isaac Hikaka for Appellant Mr Samuel Hood for First Respondents Mr Paul Lynch for Second and Third Respondents
Solicitors:	Charles Little for Appellant Browne Gibson Harvey for First Respondents Crown Law Office for Second Respondent
Date of hearing:	11, 12 June 2008
Date of decision:	11th July 2008

JUDGMENT OF THE COURT

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Background

1. This appeal is against a judgment of the High Court delivered on 21 September 2007 on a claim for judicial review of decisions of the Third Respondent ("the Authority") made under the Environment Act 2003 ("the Act"). The decisions relate to the grant of consents to the Appellant to carry out certain specified works on the foreshore of Aroa Beach at Rutaki, where the Appellant operates the Rarotongan Beach Resort which is built close to the shoreline. The proceedings were instituted by the First Respondents who are owners of coastal land adjacent to the resort.

2. In 2001, the Appellant was granted a permit (referred to as the "first consent") under section 31 of the Rarotonga Environment Act 1994/1995 to remove coastal protection units which had been installed on the foreshore in 1991 in order to alleviate erosion of the beach area. The units had deteriorated and were said to create a hazard. It was a condition of the permit that the Appellant would effect appropriate beach rehabilitation should erosion occur. The 2001 permit is not under challenge. In the following years erosion did occur, and applications by the Appellant for permits to carry out remedial work resulted. From May 2006 through to the time of the High Court hearing, four applications were made, three of which were consented to by the Authority. Those consents are referred to as the second, third and fourth consents, with the last (and fifth) application not yet being finally processed. The primary challenges to the second, third and fourth consents were that the Authority had wrongfully failed to follow the applicable procedure required by section 36 of the Act, and also had wrongfully failed to consult the First Respondents before issuing the consents.

3. The High Court upheld the claim that the Authority had acted unlawfully in both pleaded respects, quashed specified parts of two of the consents, and made a series of what were described as orders and directions in the nature of *mandamus* which included the undetermined fifth application. All orders and directions related to work in respect of a groyne which had been constructed by the previous owner to define the course of a stream which had been relocated to the east of the beach at the time the Appellant's resort was constructed. The other work which was included in the third and fourth consents, but not the subject of relief on judicial

review or relevant to this appeal, related to remedial work immediately adjacent to the resort buildings.

4. The Act establishes the Authority and defines its functions, which include the determination of applications for permits and consents for the purpose of specified sections of the Act. Section 36 requires a permit for any activity which causes or is likely to cause "*significant environmental impacts*". "Environment" is defined in terms common to such legislation. Section 50 requires consent for certain kinds of activity on the foreshore or within Cook Islands waters. The Act also establishes the Second Respondent ("the Service"). One of its functions is to prepare applications for consideration by the Authority in carrying out its responsibilities. The Service prepared the applications now in question.

5. The second consent is dated 30 June 2006 and authorised the replacement of 40 metres of collapsed streamside gabions which form part of the groyne protecting the stream.

6. The third consent was granted on 10 August 2006 and authorised the placing of rounded rocks on both ends of the groyne to protect the gabions. At that time, the replacement work was in progress. The fourth consent related to remedial work in the immediate vicinity of the resort, and did not embrace the stream groyne. It is unclear why it is referred to in the relief orders. It is common ground that they expressly exclude the subject matter of the fourth consent.

7. The fifth application also relates to the provision of rockfill to the stream training gabions.

8. In respect of both the second and third consents, the process which was required to be followed if the activity came within the ambit of section 36 was not adopted, and the consents were granted under section 50 which is a process not involving public consultation. The Chief Justice held that the Authority had failed in its duty to consider whether or not section 36 did apply, and further, that in both instances, and also in respect of the fifth application, any decision that section 36 did not apply was or would be unreasonable and unsustainable. He directed all applications (including the fifth) to be subjected to the process required by section 36, as well as making other orders of a directory and supervisory nature.

9. The issues which arise on the appeal can be summarised. First, whether the Authority was in breach of its duty to determine whether or not the application was

governed by section 36. Second, whether a decision that any such application was not governed by section 36 was so unreasonable as to require quashing. Third, whether the Authority was under a duty to consult with the First Respondents. Fourth, whether the orders granting relief were appropriate in the circumstances. We note that neither the Service nor the Authority took part in the appeal, simply abiding the decision of this Court.

10. For the Appellant, Mr David also contended that the Chief Justice erred in failing to strike out certain parts of various affidavits sworn by Mr Dorrell on behalf of the First Respondents. We see no cause to embark on a consideration of this separate ground of appeal. It has no relevance to the substance or possible outcome of the appeal, and it is quite clear that the challenged passages played no part in the judgment of the High Court. The Chief Justice was not, as was submitted, in the circumstances required to make a positive ruling on admissibility and was entitled to deal with the objection in the way he did.

11. We now turn to consider the separate grounds of appeal.

Section 36 – Consideration by Authority

12. Section 36(1)-(7) of the Act provides:

> *36. Environmental Impact Assessment – (1) No person shall undertake any activity which causes or is likely to cause significant environmental impacts except in accordance with a project permit issued under this section.*
>
> *(2) A person who proposes to undertake an activity of the kind referred to in subsection (1) shall apply to the permitting authority for a project permit in respect of the activity in accordance with the procedures (if any) prescribed by regulations.*
>
> *(3) Every application for a project permit shall be submitted to the Service and shall include an environmental impact assessment, setting out details of –*
>
> *(a) the impact of the project upon the environment and in particular –*
>
> *(i) the adverse effects that the project will have on the environment; and*
>
> *(ii) a justification for the use or commitment of depletable or non-renewable resources (if any) to the project; and*
>
> *(iii) a reconciliation of short-term uses and long-term productivity of the affected resources; and*
>
> *(b) the proposed action to mitigate adverse environmental effects and the proposed plan to monitor environmental impacts arising out of the project; and*
>
> *(c) the alternatives to the proposed project.*

(4) Every application for a project permit shall be accompanied by an application fee prescribed by regulations.

(5) The Service shall undertake public consultation for the issuance of the project permit and in so doing –

(a) publish details of the project in such a manner that these become accessible to the affected public;

(b) make available copies of the environmental impact assessment report prepared by the project developer for review by the public; and

(c) receive comments within 30 days from the date of public notice from the general public and other interested parties.

(6) The service shall request comments from any Government department or agency, or person affected by or having expertise relevant to the proposed project or its environmental impact.

(7) After the permitting authority has reviewed and assessed the application and all relevant information including the environment impact assessment, it shall, subject to guidelines (if any) prescribed by regulations –

(a) issue a permit for the proposed project specifying the terms and conditions subject to which the permit is issued; or

(b) request the applicant to submit modifications regarding the proposed project; or

(c) where there are reasonable grounds to do so (taking particular account of the purpose of this Act), refuse to issue a permit for the proposed project and state the reasons for such refusal."

13. Under section 50, the placing of fill or material or construction of any wall or structure within the foreshore of the Cook Islands waters requires the written consent of the Authority. Under subsection 2(b), the Authority may not grant a consent in respect of the foreshore unless it is of the opinion that "*the activity consented to would result in the preservation, restoration, or enhancement of the natural configuration and features of the foreshore or the natural play of water*". The section does not apply if a permit has been granted under section 36.

14. Paragraphs 5-7 of the affidavit of Mr Tangatataia, Manager of the Service, summarises the procedure relevant to the application leading to the second consent. He stated:

"5. When a person enquires to the NES as to whether their proposed activity is subject to the Act, we ask the person to complete and submit an Environmental Significance Declaration (ESD). The contents of that ESD allows the Compliance Division to determine whether the Act applies or not and if it does apply then which sections of the Act apply to the person's activities.

6. *For beach restoration of the type in this matter, the Compliance Division consider that the initial test is to determine:-*

   a. *whether Section 36 with its higher criteria and obligations applies to the proposed activity; and*

   b. *if Section 36 does not apply then whether Section 50 applies to the proposed activity; and*

   c. *if Section 50 does not apply then whether another section applies; and*

   d. *finally if the Act possibly does not apply to the proposed activity.*

7. *Based on that initial test, we then advise the person accordingly and advise them of requirements before the Application is referred to the REA for consideration. The person will then be required to submit the relevant information which the Compliance Division collate for consideration by the REA. Applications to the REA are considered at the regular REA meetings. Pursuant to the Act, the REA at all times retains the power to approve an Application or not.*

15. Although the processing of applications is initially undertaken by the Service, pursuant to section 12(1)(f) and section 36(7), it is the function of the Authority to determine the application. It is accepted that, in making a determination in respect of an activity which falls within the scope of section 50 (as here), the Authority must itself first address whether that activity is caught by section 36(1) and should be subjected to that process. This is so, even if the Service on its consideration has reached the view that the activity does not come within section 36(1), and can be processed, for example, under section 50. The duty of the Authority is to form an opinion itself as to whether or not the activity is likely to cause significant environmental impact.

16. With respect to the Chief Justice, we think that to embellish the obligation by requiring the need for a "*rigorous analysis*" is unhelpful and goes beyond the statutory intendment. The consideration, nevertheless, must be a due consideration, or as counsel respectively submitted, proper or adequate. This will require consideration of the adequacy of the material before it, and of a possible need for further information, before making the initial determination. But a mere perfunctory consideration, or an acceptance, without its own independent evaluation, of the fact that the Service has invited the Authority to consider an application which the Service has not seen fit to subject to section 36, does not discharge the duty. On the other hand, a detailed investigation into and debate on all possible consequences or ramifications of the activity is not required. What is required is a common sense approach appropriate to the particular activity, which

may include the application of local knowledge, leading ultimately to the formation of a considered opinion.

17. In the particular circumstances, we find it unnecessary to examine whether or not the Service adequately addressed the section 36(1) issue – the critical question is whether or not the Authority discharged its duty.

18. The issue of lack of due consideration by the Authority was squarely in issue and expressly pleaded in the statement of claim on which the plaintiffs went to trial. The evidence relevant to the determination of the Authority to grant what is known as the second consent is sparse, and is to be found in four affidavits filed on behalf of the Service and the Authority, which were jointly represented at trial.

(a) *Tereapii Pakitoa [Secretary to the Authority]*

[15] I recall that the Chairman of the REA attended a visit at the site after he had been served with the relevant REA papers by me. His views relating to the site visit were expressed to the REA prior to their approvals being given.

(b) *Vavia Tangatatala [Manager of the Compliance Division of the Service]*

[20] I recall that this Application did not meet the Section 36 test (paragraph 6 above). This was an Application for an extension to an existing groyne. This was not considered by the Compliance Division and the REA to be an "activity which causes or is likely to cause significant environmental impacts" under Section 36. Therefore the full EIA process was not considered necessary..

(c) *Ian Karika-Wilmott [Chairman of the Authority]*

[12] I also conducted site visits before the REA as was my practice.

[13] I was present at the REA meetings when the Applications of the Third Defendant were submitted for consideration by the REA under Section 50 of the Act. Sometimes in the past, Applications referred to the REA, for example, under Section 50 have been referred back to the Applicant to submit the Application to a full EIA process under Section 36. The REA retains that discretion.

...

[19] This [the second consent] was an Application for an extension to an existing groyne. This was considered to be likely to have a positive impact on the environment in mitigating sand loss and accreting sand and not an "activity which causes or is likely to cause significant environmental impacts" under Section 36. Therefore, the full EIA process was not considered necessary for that groyne extension Application.

(d) *Vaitoti Tupa [Director of the Service]*

> *[8] I agree that the Chairman of the REA and the members of the REA were very familiar with this site at the Resort. The Chairman had also conducted a site visit before the REA meetings as was his practice.*
>
> *[13] I recall that this application (for the second consent) did not meet the Section 36 test (referred to in paragraph 6 in the Affidavit of Vavia Tangatataia). This was an Application for an extension to an existing groyne. This was not considered to be an "activity which causes or is likely to cause significant environmental impacts" under Section 36. Therefore the full EIA process was not considered necessary for that groyne extension Application."*

19. There were seven other members of the Authority present at the June 2006 meeting, none of whom gave evidence.

20. Other than Mr Pakitoa, the above witnesses referred to the meeting in question as "*Second REA meeting April 2006 (groyne extension)*". In fact, the meeting was conducted on 29 June 2006 and the application in question related to the replacement of 40 metres of collapsed gabions.

21. There was no cross-examination of these witnesses. We were advised from the bar that Mr Hood for the First Respondents had issued summonses to Mr Karika, Mr Tupa and possibly Mr Tangatataia, but the Chief Justice refused to allow them to be cross-examined. Although in judicial review proceedings such as the present, a hearing is usually restricted to affidavit evidence with limited, if any, cross-examination, where there is a clearly identifiable disputed issue of fact the resolution of which may depend upon an assessment of credibility, care must be taken to ensure the refusal of a responsible application to cross-examine a critical witness may not result in an injustice. Here, the First Respondents as Plaintiffs were faced with bare assertions (and, effectively, an invitation to draw favourable inferences), on a critical issue, and it seems to us the preferable course would have been to enable those assertions to be tested by cross-examination. The Court is always able to control cross-examination in such circumstances. One consequence here is that on questions of fact there are no credibility findings, and accordingly, on appeal, evaluation of the evidence is essentially a matter for this Court.

22. In addition to the above affidavit evidence, it can be noted that the minutes of the Authority's meeting contain no reference to section 36. The practice of the minute-taker was not addressed in evidence so the significance of this absence is uncertain. At best, it can be seen as an absence of confirmation of due consideration of section 36, or perhaps as indicative of the limited extent to which

that issue may have featured in the overall consideration of the application. There is also the compliance manual used by the Service for its processes. Two relevant matters emerge from that manual, a document which Mr Tangatataia said the Service followed in this instance. The first is that where the statutory definition of the word "environment" was set out, the quote omits the addition made to that definition in the 2003 Act, namely, the new sub-para. (b)(ii) which reads:

> *"(ii) those natural, physical, cultural, demographic, and social qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes;"*

The second is that the manual includes as examples of projects that may require the section 36 process:

> *"• Stream Development (large scale eg. Public Areas*
> *o Rock Revetments*
> *o Gabions"*

There is also a heading relating to section 50 which addresses what is said to be *"situations where there is less significant effect on the environment and engineering reports are required"*

> *"• Stream Development (small scale eg. One Landowner, Community Work)*
> *o Rock Revetments*
> *o Gabions*
> *o Clearing debris/vegetation"*

23. It is also necessary to take into account the material which was presented to the Authority for the purposes of its determination. That comprised four documents. The first was a report from the Service which summarised the works and proposed that the Authority consider the project under section 50, recommending approval subject to some 8 conditions. There is no express reference to section 36. The second is an engineering report with attached plans for the proposed work. It is simply that. The third is what is known as an Environmental Significance Declaration containing a checklist of various matters relating and their effect. It had been completed on behalf of the Appellant. The fourth was a report dated 21 February 2006 compiled by Tonkin & Taylor, environmental & engineering consultants, headed "Coastal Assessment of Current Shoreline Position". It does not specifically address the work the subject of the application.

24. Three matters of possible environmental concern have been identified as relevant to a consideration of whether or not the proposed groyne reconstruction was caught by section 36(1). They were:

(a) resulting erosion (downdrift) on the eastern side of the groyne;

(b) the visual effect of the groyne; and

(c) its effect on public access to the beach.

Of these, it is pertinent to note that the case for the First Respondents presented at trial was confined in this respect to an allegation of resulting erosion. The additional matters of visual effect and beach access, however, were those which assumed importance in the High Court judgment. They only surfaced as relevant considerations in the course of the hearing, although Mr Tepa in his reply affidavit, after referring to erosion, did complain that his people's access to the beach had been cut off. The weight to be accorded these matters, and any others of relevance, was for the Authority when forming its considered opinion whether the activity for which approval was sought was likely to have a significant environmental impact warranting the full section 36 process.

25. We have given careful consideration to the evidence and taken into account Mr David's responsible submissions. We are driven to conclude that, although conscious of the existence of section 36 and its power to require what is presented as a section 50 application to be processed under section 36, the Authority failed in its duty to give adequate and proper consideration to whether or not section 36 was triggered in this particular case. While the evidence (which was not able to be tested or elaborated on under cross-examination) is that the Authority considered the application was not within section 36(1), just what led to that opinion and the extent and content of its consideration is unknown. Mr Tupa and Mr Tangatataia both refer, without further comment, simply to the fact that the application is for an extension to an existing groyne, while Mr Karika does the same, adding only that the work was likely to have a positive impact in mitigating sand loss and accreting sand. That, of course, is the whole purpose of a groyne in such circumstances. What is relevant is that construction of a groyne in a public area is given as an example in the manual of a section 36 situation.

26. The effect of the evidence read as a whole, including the content of the material supplied to the Authority, is that the mere fact that there was to be an extension of a groyne or, more accurately a replacement of a collapsed and now non-existent

portions of a groyne with a resulting positive effect, was seen as itself answering the threshold inquiry without further consideration. The wording of the affidavits, all in similar form, points strongly to an inference that the Authority, in reality, accepted the Service recommendation to process the application under section 50, but without undertaking in any real sense its own analysis. That did not discharge its obligation.

27. Both in the High Court and this Court, Mr Hood for the First Respondents contended that the work relating to the second consent had been misrepresented in the application, and, in fact, the 40 metres replacement involved an extension of the original groyne of some further 25 metres. We find it unnecessary to make any finding on this allegation. It was not pleaded as a ground for vitiating the consent, and it was not adequately addressed in evidence as an issue, no doubt, for that reason. Importantly, this was a claim for judicial review of the function of a statutory body's decisions calling into question their validity. Whether or not a decision was obtained by improper conduct on the part of the Appellant was not properly before the Court. Neither was whether or not the work actually carried out accords with the terms of either consent.

28. The only part of the third consent relevant for the purposes of this appeal is that relating to the groyne. The work in question involved the placing of a rounded rockfill head at both ends of the groyne for the purpose of protecting the gabions. The engineering report supporting the application noted that the replacement of the gabions authorised by the second consent was in progress. The affidavits do not address expressly the Authority's consideration of the possible application of section 36. The material supplied to it through the Service makes no reference to section 36 and the Court was invited to infer that, in accordance with stated practice the section had been addressed and determined as being inapplicable. The absence of any positive assertion to this affect could justify an inference that the issue was not adequately addressed. As the Chief Justice correctly noted, in an environmental setting, an individual application is not to be considered in isolation and the cumulative impact of earlier related developments must also be considered. However, it is difficult to see how the proposed additional rockfill at the end of each side of the groyne, either on its own or in conjunction with the replacement of the gabions, would likely have or lead to a significant environmental impact. There is no suggestion in the evidence that it could have any effect on the erosion problem other than to help stabilise the gabions, and

there is no additional impact suggested on the visual/access effects raised at the hearing in the High Court in respect of the groyne reconstruction.

29. While, arguably, there may have been a relevant failure adequately to address section 36 in respect of the other remedial work covered in this application, we consider that the decision of the Authority simply to proceed with the groyne aspect of it under section 50 cannot be classed as a breach of its section 36 obligation, itself warranting judicial intervention. Only if the second consent is set aside should this aspect of the third consent, by reason of its necessary dependency upon the validity of that, also fall.

Unreasonableness

30. The second issue is whether the decisions that the applications were not governed by section 36 were so unreasonable as to require quashing. The importance of this issue is that the finding of unreasonableness provided the basis for the order requiring the Authority to apply section 36 to the applications.

31. The Chief Justice determined that the Authority acted unreasonably in not applying section 36 to the second and third applications. This was because of the likely significant impact on amenity values, namely *"the natural, physical, cultural and social qualities of the foreshore at Aroa beach area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and culture and recreational attributes."*

32. The reasons for this finding were that the manual emphasized the importance of matters relating to the foreshore and listed foreshore protection in public areas by gabions and groynes and stream development by gabions as examples of projects requiring environmental impact assessments (EIA's): the significant visual environmental impact obvious from before and after photographs; and that the groyne extension into the sea, rendering at certain tides the passage of pedestrians impossible or difficult is an undisputable example of a *"likely significant environmental impact."* The latter point strengthened by reference in a relevant Authority meeting to the likely need for a bridge to allow pedestrians access over the stream and to the fact that the Company is proposing to apply for consent to build such a bridge.

33. As the Chief Justice rightly observed the threshold to make a finding of unreasonableness in judicial review proceedings is a high one. The principles which

apply are summarized in *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 537 (CA). The Authority was required to observe the purposes and criteria specified in the Act. It was required to consider relevant matters and disregard irrelevant matters, and to promote the policy and objectives of the Act. It is only if the outcome of the exercise of the discretion is "*irrational or such that no reasonable body of persons could have arrived at the decision*", that it can be set aside for unreasonableness.

34. The starting point is the second application. It sought approval for:

> "*(a) Replace of up to 40 metre section of the collapsed parallel gabions on reno mattress base;*
>
> *(b) Entrenched the reno mattress in the streambed;*
>
> *(c) Adjoin the stable end of the current gabion structure to the proposed newly proposed replacement.*"

We note that the application was for the replacement of the collapsed parallel gabions and associated works. The collapsed gabions had been placed in 1991 at the same time as the protection units had been installed.

35. The report of the Service to the Authority on the second consent recommended approval of the project subject to certain restrictions. It referred to the proposal as one for consideration under section 50 of the Act. The report was accompanied by an engineer's report with attached plans for the proposed work and a completed "*environmental significance declaration*" as required by the Service. It described the project as "*the replacement of the collapsed streamside gabions on reno mattress base.*" Included in the engineer's report was a reference to the last 40 metre section at the lagoon and "*had succumbed to the degradation...*". There was also a prediction that once the work had been completed "*natural beach sand accretion is anticipated to occur*". The project was said to be in line with other similar projects intended to induce sand accretion.

36. As we have earlier stated, three possible effects were identified as relevant to the question whether section 36 applied – erosion, visual impact, and beach access. In his finding under this head, the Chief Justice placed no reliance on possible resulting east side erosion, neither did Mr Hood in supporting the finding. Justification must, therefore, be found in the failure of the specialist body with local knowledge to recognize the visual and access effects as unarguably having likely significant environmental impact. These two matters must be considered in context. A

condition of the first consent was "*...that the stream training gabions located on the south-eastern beach side of the hotel must be repaired and reconstructed properly under supervision, especially the end section that has collapsed in the lagoon".* That clearly foreshadowed the need for what was the substance of the second application, which implemented the requirement to replace a structure now collapsed and partially non-existent.

37. Visual effect was not pleaded, nor was it the subject of evidence. Reliance for the conclusion appears to be based on before and after photographs, which were attached to an affidavit produced for other purposes. Interference with beach access was not pleaded, and the only reference in evidence came from Mr Tepa in his reply affidavit. The gabions control the course of the stream from the road to the lagoon. Whether the proposed replacement structure is likely to have an environmental effect classed as significant is very much a value judgment. We cannot see a decision not to class the anticipated structure as requiring the section 36 process as being "*irrational or such that no reasonable body of persons could have arrived at the decision*".

38. The First Respondent, on appeal, submitted that the terms of the manual supported the unreasonable finding. The manual lists "*gabions, groynes and stream development by gabions*" as examples of activities that may or may not require EIA's. In paragraph 22 above, we noted the distinction made in the manual. The argument was that here the manual "required" an EIA and the section 36 process, because the development was in a public area, therefore the Service and the Authority had misinterpreted or misapplied the guidelines. We consider that overstates the position. First, the manual does not and could not define for either what particular activities come within section 36. In each case, it will be a matter of fact and degree, requiring a value judgment. Second, the manual simply gives public area as an example of what may be a large scale development of this kind which may have significant impact. It makes no reference to replacement as opposed to originating structures. In this case, the application was to replace collapsed gabions and it was for the Authority to determine whether the replacement was likely to significantly affect the environment. We cannot see that the contents of the manual assist this argument. The Authority was given the power to assess the affect on the environment and make a decision accordingly.

39. We, therefore, conclude that the decision to proceed to issue the second consent under section 50 was not unreasonable and should not have been quashed on that

basis. Such a decision would not be so outrageous and in its defiance of logic or of accepted moral standards such that no sensible person who had applied his mind to the question could have arrived at it (See Lord Diplock in *Council of Civil Services Unions v. Minister for the Civil Service* [1985] AC 374). The same findings apply to the third consent.

Duty to Consult

40. The First Respondents contended that even if the Authority properly decided section 36 was not triggered, it or the Service was under a duty to consult them before any decision was made on the applications under section 50. The Chief Justice, rightly in our view, rejected submissions that a duty to consult was imposed on the Service by the manual, or, alternatively, by section 10(4) of the Act, which directs the Service to have regard to the principle of consultation. Those submissions were not renewed in this Court, neither was the further submission that the more elusive concept of procedural fairness required consultation. He held that a duty to consult was imposed under the principle of legitimate expectation, for the following reasons or a combination of them:

> *"(a) Mr Forbes and the Te Arakura Incorporation (the landowners of the land which the Resort occupies) made submissions on the first consent which was dealt with under s 36. The plaintiffs have and always have had a direct interest in matters affecting Aroa Beach. The submissions as to the first consent were recorded by the Service as follows:*
>
> *"Ian Forbes*
> *Two submissions were received from Mr Forbes and both clearly shows (sic) about his concern to the (sic) removal of the CPU's.*
>
> *(1) As a resident to that area he's very much concern to the proposal. According to him the Coastal Protection Project was a success and his beach front has gained a tremendous build-up of sand.*
>
> *(2) The second letter from Mr Forbes is a submission from Te Arakura Incorporation (the landowners of the land on which the Rarotongan Resort occupies). They are opposing to the proposal by the Manager of the Resort.*
>
> *They also commented that should the Council approve the removal of the CPU's, they would like assurance on the following:*
>
> - *What actions would be taken when beach loss is experienced and future erosion puts buildings, hotel property, and adjoining property at risk.*
> - *Who will pay for this. What legal binding guarantees will be given for proper beach reinstatement. If it is the Hotel, how will responsibility be transferred if hotel ownership is changed".*

(b) *The Service in its report to the Authority of 6 September 2001 in respect of the first consent recommended that "the Council take into consideration the questions raised by Mr Ian Forbes of Te Ara Kura Incorporation."*

(c) *The second, third and fourth consents recognised the special position of the plaintiffs by required the Company to tell them when construction work was to commence.*

(d) *Most important of all condition 4 of the first consent gave the plaintiffs a direct and ongoing interest in any future consents relating to coastal erosion at Aroa beach. It was undoubtedly inserted for their protection. When erosion did occur in 2005 – 2006 and applications were made to deal with that erosion, there arose a duty on the part of the Service, supported in the particular case by s 10(4), to consult with the plaintiffs. The circumstances were such as to the transform a discretion to consult into an obligation to consult. The subsequent consents were all interrelated and connected to the first consent."*

41. A person may have a legitimate expectation of being treated in a certain way by an administrative authority, even though there is no legal basis upon which he could claim such treatment. That expectation may arise either from a representation or promise made by the Authority, including an implied representation or from consistent past practice; See *Ex parte Coughlan* [2001] QB 213, and Laws L J in *Murphy & Others v. The Independent Assessor,* United Kingdom Court of Appeal CI/2007/1963 dated 9 July 2008.

42. The fact that Mr Forbes had the right to and made submissions on the first consent cannot in our view give him a right to be consulted on future applications. In direct contrast to section 36, if the matter correctly proceeds under section 50, there is no statutory obligation to consult. The submissions were made on an application which required public notification because of its likely significant impact. It is difficult to see how the exercise of that general right flows through to a further particular right to be consulted on a different application which does not have that likely impact, even if it relates to the same general area in which the submitter claims an interest. There are obvious difficulties in defining the extent of any duty which the Authority is expected to recognise in circumstances such as these. We can see nothing in the way the Authority dealt with the submissions that created an expectation of further consultation on the question of replacing the gabions.

43. As to the second reason, the recommendation was, in fact, implemented in condition 4 of the first consent. The assurances sought by Mr Forbes were imposed by the Authority, in terms it considered appropriate. Further consultation was neither sought

nor promised. In respect of this and the first reason, it is also significant that the recorded submissions did not refer to replacement of the stream-training gabions which had been recommended to be affected in conjunction with the removal of the protection units.

44. We do not see how the fact that the Authority required nearby residents and businesses to be notified before already-authorised work commenced can assist the argument. The recognition of an interest which is to be met in that way cannot create or translate into a recognition that there was a prior duty to consult before authorising the work. Still less can a condition not conveyed to them give the First Respondents an expectation of consultation before the condition was even imposed.

45. In the Chief Justice's view the fourth ground was the most important as he took the view that Condition 4 of the first consent gave the plaintiffs a direct and ongoing interest in the future consents relating to coastal erosion at Aroa Beach. Condition 4 read:

> "that Clause 26(b), 25(c) of the Purchase Agreement signed by the Applicant and the previous Government be strictly adhered to, ie. *That the Purchaser (Mr Tata Crocombe) undertakes in writing to provide Government with regular periodic reports of scientific monitoring studies detailing water movement, tidal flow and sand aggregation at the location or former location of the CPU's, and also that the Purchaser (Mr Tata Crocombe) undertakes to effect appropriate beach rehabilitation should erosion occur after the removal of the CPUs;"*

46. As we have said, this condition was imposed to meet the Service's recommendation in respect of Mr Forbes' concerns. We do not see how that condition can be taken as a clear representation that he or other nearby residents would be consulted in respect of reconstruction of the groyne. The wording simply places an obligation to carry out appropriate remedial work, necessarily under the control of the Authority. Importantly, condition 1 must be read in conjunction with condition 4. The obligation to replace the collapsed structure was imposed as part of the permit to remove the coastal protection units.

47. Although reply affidavits on behalf of the First Respondents complain about lack of consultation and their concern over erosion and its effect on their property, there is no suggestion that any of the above matters gave rise to an expectation of consultation.

48. There was no representation or promise made by the Authority that there would be consultation, nor can a legitimate expectation be implied from the facts of this case or from consistent past practice.

49. We find that none of the grounds upon which the Chief Justice relied either separately or in combination gave the First Respondents an enforceable legitimate expectation to be consulted on an application under section 50 where the statute itself does not impose such an obligation.

Remedies

50. The Chief Justice made declarations that the Authority acted unlawfully in granting the second, third and fourth applications by making material errors of law in one or more or a combination of the following respects:

(a) being required by law to consider for itself the possible application of section 36(1), it failed to do so;

(b) alternatively, if it did consider the possible application of section 36(1), by taking into account irrelevant considerations and concluding that section 36(1) did not apply;

(c) by unreasonably concluding that section 36(1) did not apply so far as concerned the groyne repair, reconstruction and extension;

(d) by failing to consult with the Appellant in respect to the second, third and fourth application.

51. The Chief Justice then went on to quash the second, third and fourth consents insofar as they authorised groyne repair, reconstruction and extension. He severed these parts of the consents which he considered affected by errors of law. He did not consider that the other parts of these consents should be quashed. In severing thus, he followed the approach of Lord Steyn in *R v. Secretary of State for the Home Department, Ex Parte Pierson* [1998] AC 539, 592.

52. Next, the Chief Justice made orders and directions in the following terms:

> *The Court also makes the following orders and directions in the nature of orders for mandamus:*
>
> *(1) The Authority is directed to:*

(i) reconsider and determine jointly the second, third and fourth applications so far as they deal with groyne repair, reconstruction, or extension and to consider and determine the fifth application, all pursuant to the procedures contained in s 36 of the Act and in accordance with the procedural guidance given in this judgment and;

(ii) if it is decided to affirm the earlier decisions to grant the first three consents and to grant the fourth consent, consider the adequacy of the existing terms and conditions of the second, third and fourth consents so far as concerns groyne repair, reconstruction, or extension.

(2) (i) without prejudice to the generality of (1) the Company shall prepare as soon as reasonably practicable an environmental impact assessment in respect of those aspects of the second, fourth and fifth applications dealing with groyne repair, reconstruction or extension in compliance with:

(a) s 36(3) of the Act

(b) any additional directions of the Service as to the content of such assessment.

(ii) The assessment shall address all relevant aspects of the groyne repair, reconstruction or extension work completed under the second, third and fourth consents so as to enable public submissions to be received, and consideration to be given by the Authority, as to whether the work or any part of it should be removed and/or what amendments, if any, should be made to the terms and conditions of those consents or what further conditions should be added to those consents and whether the fifth application should be granted and, if so, what terms and conditions.

(3) There shall be attached to the environmental impact assessment all of the "regular periodic reports of scientific monitoring studies" as referred to in paragraph 2(c) of the closing submissions of the Service and the Authority as well as the scientific monitoring studies themselves. (A copy of these reports and studies must also be provided to the Court no later than 21 days from the date of this judgment.)

(4) Any terms or conditions which the Authority decides, after receiving public submissions, to impose or vary in carrying out the foregoing reconsideration and determination under 298(1) shall first be submitted in draft form to this Court for approval. The Courts reserves the right to deliver a supplementary judgment as to the adequacy of the terms and conditions after first providing the parties with an opportunity for additional submissions."

53. We do not understand why the Authority was ordered to reconsider and determine the fourth application in view of the severance referred to in para. 48 above. The fourth consent did not apply to groyne repair, reconstruction and extension.

54. The Chief Justice refused the Appellant's application for an order requiring the immediate removal of the groyne extension. He considered that, whatever could be said about the adequacy of some of the information provided by the Appellant in its applications, it had not been in any way responsible for the mis-application of the Act by the Authority that subsequently occurred. There was no evidence of misconduct or bad faith on the part of the Appellant sufficient to justify such a draconian remedy. The Appellant's only failure was to not comply with a condition of a consent requiring it to notify local residents and nearby businesses that the construction work was about to commence. That failure would not provide sufficient basis for a removal order. It is difficult to see how an order to remove the groyne extension would have been made by way of an order for *mandamus*. Non-conforming structures can be dealt with by the Authority under s 36(1)(11) and (12) of the Act.

55. The Chief Justice then went on to state:

> *"without restricting decisions the Authority may make under reconsideration, there might be no utility in ordering the removal of the groyne consents because at least in the short to medium term, it was possible to take the view that the die was cast with the grant of the first consent which had been preceded by an Environmental Impact Assessment and full public consultation. It was possible, he said, that if the current beach rehabilitation of erosion protection measures prove in the long run to be unsatisfactory, the decision to remove the CPU's may have to be revisited. In the meantime, the conditions on existing consents and in relation to the fifth consent, if granted, would be of crucial significance in assessing the long run effectiveness of the groyne and the rock revetment near the Resort restaurant and whether they are causing environmental damage such as to require their removal".*

56. Counsel for the Appellant submitted strongly, as he had in the Court below, that, if there had been some failure on the part of the Authority in considering the applications, then the appropriate remedy would be merely to make appropriate declarations quashing the consents without referring the applications back to the Authority for reconsideration with directions. Because the case had been decided on affidavit evidence, the Court of Appeal is in as good a position as the Chief Justice to decide on appropriate remedies.

57. Counsel submitted that the Chief Justice had erred in not balancing the rights of the Appellant against those of the First Respondents. In particular, he had failed to give sufficient weight to:

(a) the First Respondents' delay;

(b) the efficacy of the works as shown by the evidence;

(c) the necessity for the works; and

(d) the consequences for an innocent third party in ordering a process that may see the works removed.

58. Counsel submitted that the First Respondents, having become aware of the works in June 2006, did not take action until 25 August 2006 at a time when the work was substantially completed. The Respondents' consultant was taking photos around 15 August 2006. He wrote a letter to the newspaper on 5 August 2006 and threatened a court case on 25 July 2006.

59. Expert evidence was that the gabions are working and accreting sand on both sides of the stream. Counsel submitted that the Chief Justice did not consider the Appellant's submissions on the exercise of discretion to refer back or not, other than to discuss the question of the First Respondents' delay. He failed to give adequate weight to the situation of the Appellant which operated a large hotel and which had the most to lose from any erosion or degradation of the beach. Clearly, it would not be in the Appellant's interest if the beach were to be downgraded or denuded of sand.

60. Declaratory relief in counsel's submission, would explain to the Authority the process to be followed for future applications under the Act. A reference back to the Authority raised the possibility that works might be removed, thereby threatening the viability of the resort and undermining some of its buildings. There could also be a loss of beachfront on the property of one of the Respondents.

61. This Court must decide whether declaratory relief alone is sufficient or whether there must be a quashing of the consents. Any declarations would have to be tailored to the findings of this Court and not be expressed in such a broad way as the Chief Justice expressed them. We must be mindful too that we are considering the exercise of the discretion and the normal principles about upsetting the exercise of the discretion apply.

62. The Chief Justice correctly listed the grounds normally considered when exercising the discretion to grant *certiorari*. The following seem to be most applicable to the present case:

(a) delay;

(b) the utility of ordering relief;

(c) the effect on third parties and for public administration.

63. On the question of delay, the Chief Justice quoted extensively from the judgment of the New Zealand Court of Appeal in *Auckland Casino Ltd v. Casino Control Authority* [1995] 1 NZLR 142 152. He concluded that there had been no undue delay. The first the First Respondents knew of the granting of the second consent was when they heard tractors working on the beach some time in June 2006. They contacted the Service and were told that consent had been granted. They needed to obtain legal and expert advice before proceedings were issued on 25 August 2006 and the interim injunction was issued, (It was rescinded on 4 September 2006).

64. In our view, the Chief Justice correctly decided that delay of the First Respondents in applying for relief was not such as to disqualify them from relief. The second consent was issued on 30 June 2006 and the proceedings were filed somewhat less than two months later. Whilst the application might have been filed a little earlier, we cannot see that there was undue delay.

65. We pause to observe that the application for injunction filed by the First Respondents came before Smith J, who granted *ex parte* injunctions against the Authority and the Service. This is yet another example of the incorrect issue of *ex parte* injunctions that we have observed in the High Court in the Cook Islands. Occasions are fairly rare when an *ex parte* injunction should be issued without any notice, albeit limited notice, to the defendant. In this case, the parties against which the injunction was issued *ex parte,* were both organs of the Cook Islands Government. There was no reason why an *ex parte* order should have been made against them, since they were clearly capable of appearing before the Court at short notice. *Ex Parte* injunctions should only be sought and issued where there is irreparable harm possible as a result of delay involved in giving notice.

66. Moreover, it was quite wrong for the injunction to have been sought without joinder of the Appellant in the proceedings. The decisions sought to be impugned had been given on the Appellant's applications and affected the Appellant's property. The Appellant had spent considerable money by the stage the application for injunction was sought in carrying out the works in accordance with the consents. In applications for the issue of the prerogative writs where a decision is challenged, all parties to that decision should be joined *ab initio.* It should not have been

necessary for the Appellant to have had to apply to the Court to be joined as a party.

67. In his judgment, the Chief Justice quoted *in extenso* the closing submissions of the Appellant on relief: in particular, its detailed submissions as to the appropriateness of a declaration as the appropriate remedy. The Chief Justice noted that it was exceptional for the Court not to exercise its discretion to quash a decision found to be unlawful, quoting *Chiu v. Minister of Immigration* [1994] 2 NZLR 541 and *Berkeley v. Secretary of State for the Environment* [2001] 2 AC 603. He noted there must be extreme strong public policy reasons for refusing a remedy if a plaintiff has made good case and has done nothing disentitling the plaintiff to a remedy. He acknowledged that the discretion of the court in deciding whether to grant a remedy was wide and could take into account many considerations, including the utility of granting a remedy and the adverse effect on third parties (See *Credit Suisse v. Allendale Borough Council* [1987] QB 306 355.

68. We are concerned that the Chief Justice did not give more extensive consideration to the submissions of the Appellant in support of declaratory relief only. He merely said that he paraphrased the language of Cooke P in the New Zealand Court of Appeal in *Thames Valley Electric Power Board v. NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641,652 in holding this to be a case where the errors of the administrative bodies in combination were so questionable as to impel the conclusion that something has gone wrong of a nature and degree as to require the intervention of the Court. There should have been a balancing exercise of the adverse effects of quashing the decisions on the Appellant as against the nature and quantity of the administrative error.

69. Cooke P, in that case, had noted that the ground of substantive unfairness as a legitimate ground of judicial review shades into but is not identical with the unreasonableness ground. At page 652, the learned President noted that one situation justifying intervention for unfairness, might be where the procedure and decisions of an administrative body, although possibly just surviving challenge if viewed separately, were, in combination, so questionable as to impel the conclusion that something had gone wrong. The substantive unfairness ground allows a measure of flexibility enabling redress for misuses of administrative authority which might otherwise go unchecked. Cooke P also said that it was plain "beyond argument" that, neither under the head of unfairness nor under any other head of judicial review can there be disturbance of an administrative decision

which, on objective consideration, seems to have been fairly reasonably open on the facts and which was lawfully reached after a fair procedure.

70. Fisher J at 654 of the *Thames Valley* case considered that, on each occasion when the expression "substantive unfairness" is applied to a case, it will continue to be necessary to identify a more specific principled administrative law basis for intervention. Otherwise, the distinction between judicial review and appeals on the merits will become dangerously blurred.

71. McKay J, likewise in the same case, sounded a note of warning about deciding cases under the description of unfairness, because there was a danger that, in doing so, one may convey the impression that anything unfair will be sufficient. The particular facts must be examined, including the nature of the unfairness relied upon and whether it is such to justify the intervention of the Court. Such an exercise was not done here.

72. In *Constitutional and Administrative Law in New Zealand* (3rd Ed.) by P A Joseph, section 26.4.2, the learned author identifies eleven situations where the Court may refuse relief in judicial review proceedings. He notes at page 1101 that courts have refused remedies where the decision would not have been different had the decision-maker acted impeccably. This ground was discussed by the New Zealand Court of Appeal in *Chiu v. Minister of Immigration* [1994] 2 NZLR 541, a case relied upon by the Chief Justice. That case again affirmed the Court's discretion to withhold a remedy where a substantive foundation for one has been laid. Since administrative law remedies are inherently discretionary, one could never exclude the possibility that a decision-maker's prediction that the same result would follow could provide the foundation for refusing a remedy.

73. In the *Berkeley* case (which was concerned with non-compliance with a European Community direction), Lord Hoffman stated that it is exceptional, even in domestic law for a court to exercise its discretion not to quash a decision which has been held to be *ultra vires*. The Court was not entitled retrospectively to dispense with a requirement on the grounds that the decision would have been the cause of the requirement had been obeyed.

74. In *Phipps v. Royal Australasian College of Surgeons* [2000] 2 NZLR 513, 521, the Privy Council, after referring to the *Chiu* decision (supra) said: *"Their Lordships consider that on matters of this nature each case must ultimately depend on its*

own facts. The overriding general principle is the need to achieve a fair result in the particular circumstances"... and "*When a decision is flawed by serious procedural irregularity, the person prejudiced is normally entitled to have the matter considered afresh. Justice requires that the decision should be set aside and reconsidered unless, in the particular case, there is a good reason why that should not be so*".

75. In *Just One Life Ltd v. Queenstown Lakes District Council* [2004] 3 NZLR 226, (a resource management case) the Court of Appeal observed at 235: "*But a discretionary withholding of relief is not the normal outcome of a successful attack on a reviewable decision*". The case was concerned with whether declarations should be made in respect of impugned resource consents which had been replaced by valid consents.

76. In the present case, it is difficult to say with any real degree of certainty that exactly the same decision would be made and with exactly the same conditions should the Authority come to the view that section 36 does apply. Should section 36 be considered by the Authority to apply to the application(s), then there is the potential for receiving submissions which may suggest the imposition of conditions which had not been included in earlier consents.

77. The Chief Justice should have discussed more fully his reasons for not considering the effects on the Appellant of an order sending back the decision. However, we consider that, against those effects, the public interest requires the scarce resource of a unique coastal environment to be appropriately managed. The express statutory requirement that is aimed at protecting the environment in a detailed way was not addressed here by the Authority to see whether the circumstances justified its invocation. Despite the unfortunate result for the Appellant, the public interest requires that that requirement to be properly addressed.

78. We are not persuaded that the Chief Justice was wrong in ordering the quashing of the consents on the ground that the decisions of the Authority not to process the applications under section 36 of the Act were made without adequate or proper consideration. It will, therefore, be necessary for the Authority to undertake that exercise anew. For the reasons which we have earlier set out when discussing the claimed unreasonableness of the decisions, there is no basis for directing the Authority to apply section 36 to the applications. In reaching these conclusions,

we are not to be taken as expressing any view as to whether or not section 36 was triggered. That question is for the Authority. It is not for the Court to substitute its opinion on a matter which is the statutory function of the Authority.

79. We do not think the Chief Justice had jurisdiction to make the orders requiring the Authority, in effect, to "report back" to him before its final decision was given. We see no grounds for him to consider any decision made on the fifth application which has yet to be considered by the Authority.

80. The prerogative writs are part of Cook Islands law without the benefit of the reforms effected in New Zealand by the Judicature Amendments Acts of 1972 and 1977. Had a provision been in force in the Cook Islands similar to s 4 of the Judicature Amendment Act 1972 as amended in 1977, there may have been some justification for some directions from the Court to assist the Authority when reconsidering any decision. Under section 4(5) of that Act, the Court may, when remitting a matter to an administrative body, direct that body to reconsider, either generally or in respect of specified matters: in giving directions, the Court may advise the body of its reasons and give such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matters referred back to reconsideration. The body must have regard to the Court's reasons and directions, notwithstanding anything and any other enactment.

81. Cook Islands law does not give the Court this wide power . It is not possible under the prerogative writs to do anything other than quash an impugned decision. One notes too the warnings expressed in the *Thames Valley* case and elsewhere that the role of the Court is to review the decision and not act as an appellate body, even when there has been an exercise of the section 4(5) power.

82. The Chief Justice may have purported to follow the same course as that mandated by the Court of Appeal in *The New Zealand Maori Council v. Attorney General* [1987] 1 NZLR 641. In that case, having made a declaration that it would be unlawful for the Crown to transfer assets to a State Owned Enterprise ("SOEs") without establishing any system to consider whether such a transfer would be inconsistent with the principles of the Treaty of Waitangi, the Court directed the Crown to prepare a scheme of safeguards, giving an assurance that lands and waters would not be transferred to SOEs in such a way as to prejudice Maori claims that submitted to the Waitangi Tribunal. One of the members of the Court

(Somers J) said at 704 that the Court could exercise a supervisory role through its ability to make declarations about any contemplated action.

83. We cannot see how the *Maori Council* case offers any precedent in a fairly typical administrative law situation where a decision-maker has made an error and the decision is quashed. The *Maori Council* case was quite exceptional.

84. Accordingly, the appeal is allowed in part. The orders quashing the second and third consents are confirmed. All other orders, declarations and directions are set aside. The consequence is that it will be for the Authority to consider and determine whether or not the applications giving rise to the second and third consents are governed by section 36(1), and then to process the applications in accordance with those determinations.

Costs

85. The Chief Justice ordered the Appellant to pay costs and called for submissions. These were filed but the Chief Justice has not ruled on them pending the outcome of this appeal. Costs should primarily have been awarded against the Authority and not the Appellant, since it was the Authority which had made the error and the Appellant had, as the Chief Justice held, acted properly throughout.

86. We remit the question of costs in the High Court for decision. This Court's decision will be relevant to the Chief Justice's determination of costs.

87. In this Court, the Appellant has been partly successful. However, the First Respondents have held on to the quashing of the decisions of the Authority. In the circumstances, we make no order for costs in this Court.

R. D. Barker J.A.

Barker JA

Henry JA

Paterson JA