

Decision No. A **153**/2002

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 358 of the Act

BETWEEN **ABACUS DEVELOPMENTS LTD**

(RMA 187/01)

Appellant

AND **WAITAKERE CITY COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge R G Whiting sitting alone under section 279 of the Act

HEARING at **AUCKLAND** on 7 May 2002

APPEARANCES

Mr R B Enright and Ms L S Fraser for the Council

Mr P W Mawhinney for Abacus Developments Ltd

DECISION

Introduction

[1] This is an application for waiver of the 15 working day time period for the lodging of an appeal under section 358 of the Resource Management Act 1991. The application is made under section 281 of the Act. It is opposed by the Council.

Background

[2] The respondent granted a subdivision consent to Abacus Developments Ltd as the trustee for Anzac Valley Forestry Trust.



[3] Abacus objected under section 357 to certain of the conditions imposed and has appealed the Council's decision on that objection. The appeal was lodged late, There is some dispute as to the length of the delay. The Council says it was some 40 days late and Abacus says it was lodged some 20 days late.

Preliminary Matter - Application for Substitution

[4] This preliminary matter concerns an application by Mr P Mawhinney, to effectively "stand in the shoes" of Abacus and be substituted as successor to the appeal. Abacus was removed from the Companies Register on 18 July 2001 and has therefore ceased to exist. The Council opposes this application,

[5] In support of the application to substitute, Mr Mawhinney produced a copy of the relevant Trust Deed. Under that Deed he had the power to appoint trustees. He exercised that power and appointed himself in lieu of Abacus.

[6] The relevant sections of the Act are section 2A which provides:

Successors

- (1) In this Act, unless the context otherwise requires, any reference to a person, however described or referred to (including applicant and consent holder), includes the successor of that person.
- (2) For the purposes of this Act, where the person is a body of persons which is unincorporate, the successor shall include a body of persons which is corporate and composed of substantially the same members.

And section 273 which states:

Successors to parties to proceedings-

- (1) Proceedings brought before the Environment Court shall be deemed to be also brought on behalf of the personal representatives of the person bringing the same and on behalf of the successors, if any, to the rights or interests affected thereby.
- (2) Every party in proceedings before the Environment Court shall be deemed to do so also on behalf of the party's personal representatives and the successors, if any, to the rights and interests affected thereby



[7] The issue in the present circumstances is whether Mr Mawhinney should be substituted as successor to Abacus. This question turns on the meaning of “successor” in section 2A of the Act.

[8] In *Goldmine Action Incorporated v Otago Regional Council*¹, Judge Jackson considered the meaning of this word in section 2A. He said at paragraph 18:

The first thing to note is that under section 2A(1) of the RMA a “successor” to a person is the same person for the purposes of the Act. Secondly “successor” means, according to the dictionary:

One who succeeds another in office, function, or position...

Thirdly, however, looking at the structure of section 2A, it is apparent that “successor” is not intended so widely as to mean all persons to whom the rights or privileges of involvement in proceedings under the RMA are transferred. If “successor” meant or included “assignee” there would be no need for subsection (2) an unincorporated body could simply assign its interest or rights in a proceeding (whether as a section 217A party, or section 274 interested person, or as appellant) to the subsequently incorporated person.

And further on in the decision at paragraph 29;

An “assign” is a person to whom is transferred a right or interest or some property (“title”) of another person while the latter is still alive or, in the case of an incorporated legal person, still in existence, That can occur either voluntarily (by contract, license or gift) or involuntarily. An example of the latter is when the Official Assignee takes assets in bankruptcy.

By contrast a “successor” is a person who takes a right, interest or some property (“title”) of another person after the latter dies, or ceases to exist. This too can happen at the direction of the predecessor - as under a will - or without any such action but by operation of law, for example under the Administration Act 1969 for a natural person, or under the Companies Act 1993 or Incorporated Societies Act 1908 for an artificial person.

[9] Section 273 is a deeming provision which operates in circumstances where proceedings are deemed to have been brought by a person’s successors if they die, or ceases to exist. In the present circumstances Abacus was struck off the Companies Register on 18 July 2001 and therefore, has ceased to exist by operation of law under that Act. Mr Mawhinney, has exercised his power of appointment to appoint himself as trustee. He thus succeeds Abacus as trustee.



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[10] The Council submitted that Mr Mawhinney has failed to establish that he has become the successor of Abacus by operation of law or any agreement, and that there is no evidence of any relationship with, or succession to Abacus Developments.

[11] However, I am of the view that by applying the dictionary meaning of “successor”, Mr Mawhinney has succeeded another, namely Abacus, to the office of trustee.

[12] If I am wrong in this regard, I would exercise my powers pursuant to section 278(1) of the Act and substitute Mr Mawhinney as a party under Rule 107 of the District Court Rules which provides:

Where, by reason of debt or bankruptcy or any other event occurring after the commencement of a proceeding and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the proceeding, it becomes necessary or desirable that any person not already a party to the proceeding should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, in order that the proceeding shall be carried on between the continuing parties to the proceeding and the new party or parties may be obtained ex parte on application to the Court upon an allegation of such change or transmission of interest or liability, or of such person interested heaving come into existence.

The Delay

[13] The appeal was lodged on 6 March 2001. According to Mr Brown, a resource management officer for the Council, the decision was posted to Abacus at its address for service by letter dated 14 November 2000. Under section 352(5) of the Act it is deemed, in the absence of proof to the contrary, to be received at the time at which the letter would have been delivered in the ordinary course of the post. This would have been on or about 15 November 2000. Thus the appeal would have been in the vicinity of 40 days late, taking account of the statutory holidays and Christmas vacation.

[14] Mr Mawhinney, who gave evidence, said that the letter and notice of decision were never received. It was only after enquiry that a facsimile dated 9 January 2001 was sent containing the Council’s decision. Thus the appeal would have been 20 working days late.



[15] I have no reason to doubt Mr Mawhinney's evidence. I accept, that for some unknown reason, the letter and enclosures were not received by Abacus in November 2000. I therefore consider the matter on the basis that the appeal was late by 20 working days.

The Law

[16] Relatively, section 281 of the Act enables a person to apply to the Court to waive the time limit within which any appeal shall be lodged. Subsection (3) states:

3. Without limiting subsection (2) the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the Court (to which subsection (1)(a)(ii) applies) unless it is satisfied that -
 - (a) The appellant or applicant and the respondent consent to that waiver; or
 - (b) Any of those parties who have not so consented will not be unduly prejudiced.

[17] "Undue prejudice" means prejudice greater than that which would necessarily follow in every case from waiving compliance with the time for appealing, see *Reilly v Northland Regional Council*, A038/93, 1 & 2 NZPTD 615, 2 NZRMA 414; *Noel Leeming Appliances v North Shore City Council* A109/92, 1 & 2 NZPTD 364, 2 NZRMA 113; and *Shardy v Wellington City Council* W083/92, 1 & 2 NZPTD 412.

[18] The fact that a party will incur costs is not a valid ground of prejudice on an application to waive a late filing of an appeal. It is the lateness to which prejudice must relate not the fact that the appeal will incur costs, see *Pacific Design v Wellington City Council* W002/96, 1 NZED 165.

Is There Any "Undue Prejudice"

[19] For the Council Mr Enright submitted that undue prejudice to the Council arises from a combination of the following:

- (i) The delay involved;
- (ii) The lack of reason or excuse for the late appeal;



- (iii) The costs and officer time to the Council;
- (iv) The fact that Council is a public funded body and has a statutory duty to defend these proceedings (if leave is granted);
- (v) The lack of merit in the appeal.

I will deal with each of these in turn.

(i) *The Delay Involved*

[20] I do not consider a delay of 20 days to be of any great moment in this case. As Mr Mawhinney submitted, it is negligible when compared with the 305 working days it took from the lodging of the application to the last date for the lodging of the appeal.

(ii) *The Lack of Reason or Excuse for the Late Appeal*

[21] Mr Mawhinney claimed that he was busy preparing for another hearing during the months of January and February 2001. As he was applying his mind to that pending hearing he allowed the appeal time to expire. While this may be a reason for the delay it is not in my view a reasonable excuse.

(iii) *The Costs/Officer Time*

[22] Mr Enright, referred to the Council's costs of defending the appeal and the significant input of officer time that would be required. In my view, both of these factors are not a valid ground of prejudice. As I have previously pointed out, it is the lateness to which prejudice must relate, not the fact that any appeal will incur costs or officer time.

(iv) *The Fact that Council is a Public Funded Body and has a Statutory Duty to Defend these Proceedings (if leave is granted)*

[23] I consider this is not a valid ground of prejudice for the reasons given in (iii) above.



(v) *The Lack of Merit in the Appeal*

[24] Mr Enright pointed out that most of the points raised in the appeal are jurisdictional. Mr Mawhinney's argument is, that as the subdivision is a controlled activity under the proposed plan, the Council cannot impose consent conditions that fall outside the controlled activity criteria, set out in the proposed plan. However, Mr Mawhinney submitted that the argument fails, because under the transitional plan the application is non-complying, and thus Council's ability to impose consent conditions is not limited.

[25] On the other hand, Mr Mawhinney submitted that consent is not sought under both plans. The application was only under the proposed plan. Accordingly, the Council cannot rely on the transitional plan provisions. He relies on an obiter statement by the Court of Appeal in *Bayley v Manukau City Council* 1998 NZRMA 385-342.

[26] I consider that Mr Mawhinney's argument has sufficient basis to warrant it being considered by the Court in substantive proceedings.

Finding on Undue Prejudice and Exercise of Discretion

[27] Overall, I am satisfied there is no undue prejudice. I am therefore able to exercise my discretion and grant a waiver if I consider it appropriate in the circumstances. The delay is not great in the present circumstances. The only prejudice is to the Council. I do not consider it sufficiently serious to warrant my declining the application for waiver, notwithstanding the reasons advanced for the delay. I accordingly exercise my discretion and grant the application for a waiver as sought.

DATED at AUCKLAND this 25th day of July 2002.



R Gordon Whiting
Environment Judge

