

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2010-485-2310
[2012] NZHC 2515**

UNDER THE RESOURCE MANAGEMENT ACT
1991

BETWEEN BURRELL DEMOLITION LIMITED

AND ALEXANDER JAMES BURRELL
Applicants

AND WELLINGTON CITY COUNCIL

AND WELLINGTON REGIONAL COUNCIL
Respondents

Counsel: P A Morten for Applicants
S F Quinn for Respondents

Judgment: 27 September 2012

*In accordance with r 11.5, I direct the Registrar to endorse this judgment
with the delivery time of 4.30pm on the 27th September 2012.*

**JUDGMENT OF WILLIAMS J
(APPLICATION FOR LEAVE TO APPEAL)**

Solicitors:
Harkness Law Ltd, Wellington
DLA Phillips Fox, Wellington

[1] The appellants apply for leave to appeal. The questions posed are as follows:

- (a) when interpreting section 338(4) of the Resource Management Act 1991, what level of knowledge is required before the court can find that the contravention giving rise to the information first becomes known, or should become known to a local authority or consent authority (in this case, the court found that time does not start to run until a local authority or consent authority has become sure of its ground, which was on 23 December 2008, six months before the informations were laid: judgment, paragraph [49]);
- (b) whether, when considering whether a local authority or consent authority has shown beyond reasonable doubt that offending occurred on a relevant date (that is, 23 December 2008):
 - (i) establishing a breach of specific consent conditions (here, height and batter slope angles) is not part of the actus reus of the offence;
 - (ii) the authority simply has to prove the discharge of contaminants to land and the operation of a landfill, on or about the relevant date, but not the breach of any particular consent conditions;
 - (iii) the consent holder must prove on the balance of probabilities, as a positive defence, not just the existence of discharge of contaminant and land use consents, but in addition that whatever was done on the relevant date complied with all consent conditions;
 - (iv) authorities are not bound by particulars they give of breaches of consent conditions;
 - (v) it is open to the Court to infer that offending occurred on the relevant date, despite the fact that the informations do not state the existence of a continuing offence, despite the absence of any evidence about what occurred on the relevant date, despite at best vague evidence about what occurred on 14 August 2008 (four months before the relevant date) and on 9 and 10 June 2009 (six months after the relevant date), and in reliance on an interview with Mr Burrell (which addressed in general terms how the landfill operated);
- (c) whether the High Court erred in law when construing the resource consent conditions in concluding that maximum fill heights allowed in the resource consent were 150 meters above mean sea level, when no datum level was referred to in the resource consent application;
- (d) whether the High Court erred in law, in relation to batter angles, in finding that:

- (i) the respondents were not bound by the wrong particulars given in their solicitors' letter of 28 June 2010 (that batter slopes exceeded 70°);
 - (ii) the respondents had no onus to establish beyond reasonable doubt, as part of the actus reus, that batter slope angles had been exceeded, or exceeded at the relevant date;
 - (iii) (implicitly) that the respondents did not know the applicants had exceeded the batter slope angles until 23 December 2008;
- (e) in finding that, while the respondents should have disclosed documents relating to the period July to December 2008, in respect of the state of knowledge of council officials about breaches of consent conditions, there was nevertheless no miscarriage of justice or breach of the New Zealand Bill of Rights Act 1990.

[2] Some of the questions as posed are not helpfully put. Indeed they are occasionally drafted in tendentious form. It seems to me that the issues advanced by the appellants resolve themselves into six questions as follows:

- (1) Was the High Court correct in concluding that time for the purposes of s 338(4) of the Resource Management Act did not start running until the respondents' lead provider tendered his advice on the alleged offending?
- (2) Was the High Court correct in holding that the respondents were not required to provide direct evidence of filling on the site on or about 23 December 2008?
- (3) Was the High Court correct in concluding that it was not necessary for the respondents to prove that the appellants' landfilling activity had breached consent conditions for the site?
- (4) Was the High Court correct in concluding that the maximum fill height provided in the Resource Consent was 150 metres above mean sea level?

- (5) Was the High Court correct in finding that the respondents were not bound by the particulars of batter slope angles at the landfill provided to the appellants on 28 June 2010?
- (6) Was the High Court correct to conclude that there was no miscarriage of justice in the respondents' failure to disclose documents to the appellants prior to trial relating to the period of July to December 2008?

[3] I am satisfied that the test for the grant of leave to appeal is met in respect of questions 1, 2, 3 and 5.

[4] Question 4, technically at least, raises a question of law but it is strictly fact specific and raises no question of any general importance sufficient for reference to the Court of Appeal. The appellants' success in question 6 depends on success in question 1, so it is unnecessary for the Court of Appeal to address question 6.

[5] By contrast, the questions for which leave is granted all raise questions of law and have potential significance beyond this particular litigation. They therefore meet the test in *R v Slater*.¹

[6] The appellants seek an interim stay so that filling may continue pending the appeal. The Councils argued for the imposition in any stay of a maximum fill height of 220 metres AMSL, but the appellants say that due to fill management on site, such a height restriction is completely unworkable.

[7] I am prepared to extend the stay until Monday 4 February 2013 or until the matter comes before the Court of Appeal whichever event occurs first, subject to the following conditions:

- (a) the appellants file in court within 14 days hereof a landfill management plan for the stay period nominating fill zones and maximum fill heights, the terms of which are acceptable to me;

¹ [1997] 1 NZLR 211 (CA).

- (b) the appellants file in court within 14 days hereof a timeline for filing either a temporary or final consent application for the landfill, the terms of which are acceptable to me;
- (c) both documents to be served on the respondents' solicitors;
- (d) failure to file the required documents by 5pm, Friday 11 October 2012 will cause this stay to lapse at which point the landfill must be closed.

[8] I will advise acceptance or otherwise of the management plan and application timeline on or before Wednesday 24 October 2012.

[9] Leave to all parties to apply for further directions on 48 hours' notice.

Williams J