IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002294
[2015] NZHC 1035

UNDER	the Resource Management Act 1991
AND	
IN THE MATTER	of an appeal against a decision of the Environment Court under section 299 of the Act
BETWEEN	THUMB POINT STATION LTD Appellant
AND	AUCKLAND COUNCIL Respondent

Hearing: 26 March 2015

Appearances: M Williams for Appellant
G Lanning and A Smith for Respondent

Judgment: 18 May 2015

(RESERVED) JUDGMENT OF ANDREWS J

This judgment is delivered by me on 18 May 2015 at 2.30 pm
pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Introduction

[1] Thumb Point Station Ltd and associated entities[1] own the Man O'War farm on Waiheke Island. Thumb Point appealed to the Environment Court in relation to subdivision rules set out in the Proposed Auckland Council District Plan - Hauraki Gulf Islands ("the HGI Plan"), notified in September 2006 (Decisions Version issued in May 2009).

[2] In its decision delivered on 13 August 2014, the Environment Court rejected Thumb Point's submission that more liberal rules should be made in the HGI Plan for subdivision of those parts of the Man O'War farm designated as "Landform 5" (productive land).[2] The subdivision issue was one of five issues determined by the Court. Only the subdivision issue was subject to the present appeal.

[3] Thumb Point has appealed to this Court pursuant to s 299 of the Resource Management Act 1991 ("the Act") on the grounds that the Environment Court made errors of law in its consideration of proposed amendments to the subdivision rules for Landform 5.

Relevant statutory provisions

[4] Sections 72–76 of the Act relate to district plans. Section 72 sets out the purpose of a district plan as being "to assist territorial authorities to carry out their functions in order to achieve the purpose of the Act". The purpose of the Act is set out in s 5: "to promote the sustainable management of natural and physical resources".

[5] Sections 73–75 set out provisions as to the preparation and change of district plans (s 73), matters to be considered by a territorial authority when preparing and changing its district plan (s 74), and the contents of a district plan (s 75). Section 76 provides that a territorial authority may include rules in a district plan, for the

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1 Huruhe Station Ltd, Man O'War Farm Ltd, Man O'War Station Ltd and South Coast Station Ltd, collectively referred to in this judgment as "Thumb Point".

2 *Thumb Point Station Ltd v Auckland Council* [2014] NZEnvC 175 ("the Environment Court decision").

purpose of carrying out its function under the Act and achieving the objectives and policies of the plan.

[6] The Environment Court has set out tests to be applied when considering proposed district plan provisions as being whether the provisions:[3]

(a) accord with and assist the Council in carrying out its functions under Part 2 of the Act;

(b) take account of effects on the environment;

(c) are consistent with and give effect to applicable national, regional and local planning documents; and

(d) meet the requirements of s 32 of the Act, including whether the policies and rules are the most appropriate for achieving the objectives of the plan.

[7] Section 32 of the Act, as at the time the HGI plan was notified,[4] provided:

> **32 Consideration of alternatives, benefits, and costs**
> (1) In achieving the purpose of this Act before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
> (a) the Minister, for a national policy statement or a national environmental standard; or
> (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
> (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1)
> (2) A further evaluation must also be made by—
> (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
> (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.

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3 See e.g. *Long Bay-Okura Great Park Society Inc v North Shore City Council* Environment Court A78/2008, 16 July 2008 at [34] and *Fairley v North Shore City Council* [2010] NZEnvC 208 at [7].

4 As at 10 August 2005 to 30 September 2009.

(3) An evaluation must examine—
  (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
  (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

(3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must cross-examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.

(4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account:
  (a) the benefits and costs of policies, rules, or other methods; and
  (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.

(5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.

(6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.

[8] Relevant to the HGI plan are the New Zealand Coastal Policy Statement 2010 ("NZCPS 2010") and the Auckland Regional Policy Statement ("ARPS"). The ARPS contains provisions which must be given effect to in the HGI plan. Of particular relevance is policy 2.6.17, which seeks to manage the use, development and protection of natural and physical resources and the subdivision of land in rural areas in an integrated manner.

[9] Objective 6.3.5 of the ARPS is "to maintain the overall quality and diversity of character and sense of place of the landscapes in the Auckland region" and objective 7.3 relates to the preservation of the coastal environment and its protection from inappropriate subdivision, use and development. Related policies include policy 6.4.22.3, which relates to the management of landscapes immediately adjoining areas identified as "outstanding natural landscapes" ("ONLs")[5] so that they protect the visual and biophysical linkage between the two areas, and policy

[5] See *Man O'War Station Ltd v Auckland Council* [2015] NZHC 767; this Court's judgment on the appeal by Man O'War Station Ltd against the identification of ONL 78 on Man O'War farm on Waiheke Island in Proposed Change 8 to the ARPS.

6.4.22(7) which provides that subdivision incentives associated with the restoration and enhancement initiatives may be appropriate in certain circumstances.

[10] The HGI plan sets out strategic objectives for resource management issues across the gulf islands. Particularly relevant in the present case are:

> **A** **Objective 2.5.4.3**. To limit the intensity of land use and subdivision to a level which is appropriate to the natural character of the coastal environments.
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> **B** **Objective 2.5.4.1**. To ensure that buildings and structures in areas of high natural character and/or significant landscape value are sited and designed in a manner that maintains the dominance of the natural environment.
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> **C** **Objective 2.5.5.3** To encourage retention, management and enhancement of existing indigenous vegetation and the rehabilitation and enhancement of degraded areas of existing indigenous vegetation.
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> **D** **Objective 2.5.5.4**. To achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable landscape features.

[11] Also relevant are the following objectives and policies in s 3 of the HGI Plan: "strategic management areas":

> **A** **Objective 3.3.4**. To provide for the economic, social and cultural well-being of the Waiheke community while ensuring the protection of the historic heritage, landscape character, the natural features, eco sytems and visual amenity of the Island.
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> **B** **Policy 3.3.4.2**. By providing for larger scale, rural activities to occur in eastern Waiheke, while ensuring that such development does not detract from the natural landscape and natural features of the Island.
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> **C** **Policy 3.3.4.4**. By protecting the landscape character of the Island, including its elements and patterns, particularly outstanding natural landscapes, coastal and rural landscapes and landscapes with regenerating bush.
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> **D** **Policy 3.3.4.5**. By protecting and, where appropriate, enhancing natural features and associated processes, such as wetland systems, indigenous vegetation, wild life habitats and coastal and other eco systems.

[12] This appeal concerns, in particular, the minimum site area for restrictive activity subdivisions in "Landform 5" (productive land). Landform 5 has specific

objectives and policies which are set out in s 10(a).6 of the HGI plan. Of particular relevance are:

> **A** **Objective** 10(a).6.3. To provide for productive activities and to ensure that the open pattern and rural character of the landscape is maintained.
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> **B** **Policy** 10(a).6.3.1. By providing for productive activities such as pastoral farming, viticulture and horticulture to establish and operate within the land unit.
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> **C** **Policy** 10(a).6.3.2. By limiting the non-productive activities that can occur so that the rural use and character of the landscape is maintained.
>
> **D** **Policy** 10(a).6.3.3. By requiring new sites to be of a size and nature which ensures that moderate to large scale productive activities can occur and which protects the open pattern and rural character of the landscape.

[13] Part 12 of the plan deals with subdivisions. Under restricted discretion activity r 12.8.2, the minimum site size in Landform 5 is 25 ha.

The Environment Court decision

[14] The Court noted that Thumb Point sought to have the rules as to the minimum lot sizes for Landform 5 to be amended by reducing the minimum from 25 ha to 15 ha. The Court also noted that the 15 ha minimum was sought to apply to only those parts of the Waiheke property which were not part of the area identified as ONL 78. The Court recorded that Thumb Point proposed that the subdivision rules be amended so that the minimum restricted discretionary activity lot size within the ONL would be maintained at 25 ha, while in the remaining areas of Landform 5, the minimum lot size would be 15 ha, with an expanded assessment criteria which allowed for active re-vegetation.[6] Thumb Point argued that this represented the most appropriate method for achieving the objectives and policies of the HGI Plan.

[15] The Court summarised the respective submissions for Thumb Point and the Council. The Court noted Thumb Point's submission that an "arbitrary" minimum lot size for Landform 5 of 25 ha would neither achieve the purpose of the Act, nor be the most appropriate (efficient or effective) way of achieving the objectives and policies of the HGI plan. The Court noted that it was Thumb Point's case that a

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6 Environment Court decision, above n 2 at [20]–[23].

minimum lot size of 25 ha is too small for pastoral farming and too large for horticulture, and consequently inefficient in terms of s 32 of the Act.[7]

[16] The Court then recorded Thumb Point's submission that the (unspecified) revised rule framework it sought would give better effect to objectives and policies of the NZCPS 2010, operative regional policy statement policies for the coastal environment, protection of areas identified as ONL, provisions of the HGI plan, and specific Landform 5 objectives.[8]

[17] The Court noted the submission for the Council that a relatively straight-forward rule framework should be retained, with a 25 ha minimum site area for all Landform 5 areas. The Court also noted the submission for the Council that a 25 ha minimum was the most appropriate, as it would meet the subdivision objectives of the HGI Plan and the objectives and policies of Landform 5, and would not reduce the productive capacity of the land. The Council had also submitted that reducing the minimum from 25 to 15 ha would potentially change the nature of the landscape from one with an open pattern and rural character to one of greater diversity, reduced land use scale and openness, and increased presence of built form.[9]

[18] The Court then summarised the evidence given for Thumb Point and the Council.[10]

[19] In its "evaluation and findings", the Court first noted that Thumb Point had not proffered a specific rule change, but had set out its understanding of what amendments would be required.[11] The Court then stated:[12]

> This part of the case being concerned with an inquiry under s 32(3), we confine our attention to the objectives. That is, we cannot for the present purpose bring to account methods, or policies in the HGI plan, or indeed higher-order planning imperatives … as urged by [Thumb Point] as well.

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7 At [25]–[26].
8 At [27].
9 At [30]–[31].
10 At [37]–[66].
11 At [67]-[69].
12 At [71].

[20] Having referred to the HGI objectives put forward by Thumb Point, the Court noted that "the difficulty" for Thumb Point was that most of the objectives referred to could be discounted from the equation by reason of their focus on protection, preservation, retention, management, avoidance, and reference to existing features. The Court considered that objective 2.5.5.4 in the HGI Plan (to achieve positive environmental benefits from subdivision and development including planting and protection of significant environmental features, heritage features, and other notable features) was the most relevant. However, the Court said:[13]

> … We are faced with the wording of the provision that focuses on features. The provisions (indeed the relevant parts of the HGI plan) are notably deficient in encouraging re-vegetation for enhancement or even remediation of natural landscapes.
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> (underlining as in original)

[21] The Court accepted as correct the submission for the Council that "this lacuna" was explained by the fact that Landform 5 "is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features".[14]

[22] The Court concluded:[15]

> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on the point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
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> We cannot find in favour of [Thumb Point] on issue 1. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.

Appeal issues

[23] Thumb Point appeals against the Environment Court's decision on the following grounds:

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13 At [73].
14 At [74].
15 At [75]–[76].

(a) The Court was wrong to apply s 32 of the Act as a limit to the Court's jurisdiction. Thumb Point argues that the Court declined to determine the appeal on the basis that it was unable to do so, because s 32 had not been complied with.

(b) In any event, the Court misapplied the objectives of the HGI Plan in rejecting Thumb Point's proposal.

[24] The Council contends in response:

(a) The Court did not apply s 32 as a limit to its jurisdiction, but did in fact determine the substance of the appeal directly.

(b) The Court applied the objectives of the HGI Plan correctly. Re-vegetation is not consistent with the objectives of the HGI Plan.

(c) Thumb Point's appeal is not on a question of law; rather it involves revisiting the merits of the matter, which should not be countenanced.

(d) Even if this Court were to re-examine the merits, it should not differ from the Environment Court's conclusion. In particular, Thumb Point's proposal was insufficiently certain to be applied.

Approach on appeal

[25] In my earlier judgment in *Man O'War Station Ltd v Auckland Council*,[16] I set out the agreed approach to be taken in an appeal to the High Court under s 299 of the Act. It suffices to summarise the approach as follows:[17]

(a) An appeal to this Court under s 299 of the Act is an appeal limited to questions of law, and appellate intervention is therefore only justified if the Environment Court can be shown to have:

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16 *Man O'War Station Ltd v Auckland Council*, above n 5 at [25]–[27].

17 See *Ayrburn Farm Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at [33]–[36]; *Young v Queenstown Lakes District Council* [2014] NZHC 414, at [19]; and *Guardians of Paku Bay Association Inc v Waikato Regional Council* (2011) 16 ELRNZ 544 (HC) at [33].

i) applied a wrong legal test; or

ii) come to a conclusion without evidence or one to which on the evidence it could not reasonably have come; or

iii) taken into account matters which it should not have taken into account; or

iv) failed to take into account matters which it should have taken into account.

(b) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law, and the question of the weight to be given relevant considerations is for the Environment Court alone and is not for reconsideration by the High Court as a point of law.

(c) Further, not only must there have been an error of law, the error must have been a 'material' error, in the sense that it materially affected the result of the Environment Court's decision.

(d) The High Court acknowledges the expertise of the Environment Court, and will be slow to determine what are really planning questions, involving the application of planning principles to the circumstances of the case.

The HGI Plan "anomaly"

Submissions

[26] Before addressing the specific appeal issues, Mr Williams referred in his submissions to the "anomaly" or "lacuna" in the HGI Plan. This was that in an "unrestricted" discretionary activity application for a subdivision consent the Council considers (under r 12.11.13 of the HGI Plan):

> The extent to which the subdivision provides for ecological restoration and enhancement where appropriate. Ecological enhancement may include enhancement of existing indigenous vegetation, replanting, and weed and pest control.

[27] However, in r 12.8.2 of the HGI Plan, which sets out the matters the Council may in the exercise of its discretion consider in relation to an application for a restricted discretionary activity, "ecological restoration and enhancement" is not included; nor are any of the other matters set out in r.12.11.13 (the extent of adverse effect on natural features, patterns and landscape character, the extent to which the size and shape of sites maximises protection of indigenous vegetation, and the extent to which the proposed subdivision maximises the use of areas already cleared for vehicle access and building sites). Thus active re-vegetation could not be required as part of a subdivision complying with the 25 ha minimum lot size in Landform 5.

[28] Mr Williams submitted that in its decision the Environment Court had noted the deficiency in the HGI Plan, but had rejected submissions that it could, and should, move to correct the anomaly by including additional assessment criteria. He submitted that the Court had done so on a "technicality" that was wrong in law. He submitted that this was the principal motivating factor behind the appeal.

[29] Mr Williams submitted that the Environment Court had erred in law in that, notwithstanding its finding that the HGI Plan provisions (including the Plan's objectives) were notably deficient, the Court treated those objectives as determinative, precluding any further consideration of Thumb Point's proposed amendments, once it had found that those amendments did not meet the HGI Plan objectives. Referring to the Environment Court's decision in *Eldamos Investments Ltd v Gisborne District Council*,[18] and the Supreme Court's judgment in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*,[19] he submitted that the deficiencies in the HGI Plan required the Court to consider Thumb Point's proposed amendments against Part 2 of the Act and other relevant higher-order planning documents such as the NZCPS 2010 and Change 8 to the ARPS.

[30] On the other hand, Mr Lanning submitted that there was no anomaly, and that while the Environment Court had recorded its initial concern with the plan, this concern had been addressed and resolved during argument in that Court. He

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18 *Eldamos Investments Ltd v Gisborne District Council*, NZ Env Ct W47/2005, 22 May 2005 at [131].

19 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

submitted that the Environment Court had correctly accepted that the HGI Plan objectives are consistent with the Act. The HGI Plan objectives do not encourage re-vegetation of Landform 5 land so as to enable subdivision, because Landform 5 is intended to provide for large-scale productive farm use. This is shown by the emphasis on maintaining the "open pattern and rural character" of Landform 5 land.

Discussion

[31] In most cases, the Environment Court is entitled to rely on a settled plan as giving effect to the purposes and principles of the Act. There is an exception, however, where there is a deficiency in the plan.[20] In that event, the Environment Court must have regard to the purposes and principles of the Act and may only give effect to the plan to the degree that it is consistent with the Act. As such, it is necessary to assess whether the highlighted anomaly required the Court to have regard to the wider context of the Act.

[32] At [72] of its decision, the Environment Court directly addressed this issue, and recorded the Council's submission that the objectives in relation to Landform 5 were directed at the purposes of protecting a particular feature and so were narrower than the general purposes of the Act. The Court concluded that the Council was correct, and that the HGI Plan was properly able to select purposes for particular areas that reflected the needs of that area, rather than treating all areas with the uniform brush of the principles and purposes of the Act.

[33] I am not persuaded that the Environment Court was wrong to conclude that the Council, in settling the HGI Plan, was entitled to prioritise certain objectives over others in particular areas. Indeed, one of the major reasons why councils are given the power to settle regional plans is to allow them to identify where and how objectives of the Act should be given effect.

[34] It follows that the Environment Court was entitled to rely on the HGI Plan as giving effect to the higher directives contained in the Act and elsewhere. As the Council identified, the purpose of protecting Landform 5 was to protect its current

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[20] *Eldamos Investments Ltd v Gisborne District Council*, above n 18; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*, above n 19.

character as productive land – that is, working farms. This is the basis on which the provisions relating to Landform 5 were included in the HGI Plan. Where re-vegetation is normally a benefit in terms of the objectives of the Act, that may not be the case where a council wished to protect the current character of an area, without re-vegetation. There is no inconsistency between this and the higher objectives.

[35] I therefore conclude that there is no anomaly, and the Environment Court was not in error in applying the objectives of the HGI Plan.

Appeal submissions

[36] Mr Williams submitted that s 32 of the Act (as applicable to the present case) requires "an evaluation" of a proposed plan before it is publicly notified (s 32(1)), then "a further evaluation" before a local authority makes a decision on submissions on the proposed plan (s 32(2)). He submitted that on an appeal, the Environment Court steps into the shoes of the territorial authority, by virtue of s 290 of the Act (which provides that the Court has the same powers, duty and discretion as the person against whose decision the appeal is brought). Section 32(3) sets out what the evaluation must examine.

[37] Mr Williams then submitted that the Environment Court had confined its consideration to "objectives" then, having found that Thumb Point's proposed amendments to the subdivision rules for Landform 5 did not meet the objectives of the HGI Plan, did not go on to consider, for example, Part 2 of the Act ("Purpose and Principles"), the NZCPS 2010, and Change 8 to the ARPS. In doing so, the Court had wrongly interpreted s 32 as a constraint on its jurisdiction to consider the proposed rules further, when an adverse finding under s 32 does not preclude consideration of other matters.

[38] In support of his submissions, Mr Williams referred to the judgments of the Court of Appeal in *Kirkland v Dunedin City Council*,[21] and of Chisholm J in *Shaw v Selwyn District Council*,[22] He submitted that these authorities supported his

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21 *Kirkland v Dunedin City Council* CA 121/01, 29 August 2001.
22 *Shaw v Selwyn District Council* [2001] NZRMA 399.

submission that s 32 is of a procedural nature, and the Environment Court should not have take an overly rigid "jurisdictional" approach to s 32 which precluded it from properly evaluating Thumb Point's proposed amendments. He also pointed to the way that the Court had responded to the alleged anomaly in the HGI Plan, and had declined to consider the NZCPS 2010 and Change 8 to the ARPS, as being errors in the way the Court had approached the HGI Plan and s 32.

[39] As a result of the above errors, Mr Williams submitted, the Environment Court had failed to consider evidence regarding the social and economic implications of Thumb Point's proposed amendments, and had failed to consider a substantial purpose of the proposed amendments, which was to confine the proposed amended rules to land outside the ONL 78 area. Further, the court did not consider Thumb Point's submission that its amendments were aimed at ensuring that regard was had to the provisions of s 6(a) and (b) of the Act (which provides that the preservation of the natural character of the coastal environment and outstanding natural features and landscapes from inappropriate subdivision, use and development are "matters of national importance".

[40] For the Council, Mr Lanning submitted that the Environment Court did not approach s 32 as a limit on its jurisdiction. Rather, the Court identified the key issue as being the extent to which Thumb Point's (unspecified) amendments would achieve the objectives and policies of the HGI Plan. Those objectives and policies had been recently settled and encapsulated the purposes of the Act. Therefore, the Court did not need to undertake an evaluation of other matters under the Act.

[41] Further, he submitted that it cannot be concluded that the Court was making statements as to a limit on its jurisdiction when it said that it "cannot be satisfied" that Thumb Point's proposed amendments were the most appropriate way to achieve the objectives of the HGI Plan, and that "we cannot find in favour of Thumb Point". Rather, it was simply stating its finding as to which of the options before it was more appropriate to achieve the objectives and policies of the Plan.

[42] Mr Lanning also submitted that the Court did not misinterpret the relevant HGI Plan objectives and policies. It heard extensive argument as to the

identification and interpretation of, and relationship between, the relevant objectives and policies.

[43] Mr Lanning submitted that no question of law is raised by Thumb Point's submission that the Environment Court failed to place sufficient emphasis on other objectives and policies. In any event, the Court correctly interpreted the hierarchy of HGI plan provisions and focussed on Landform 5 objectives and policies, as the issue was what subdivision rules would most appropriately deliver the environmental outcome for Landform 5.

[44] He also submitted that Thumb Point had not presented a sufficiently detailed and certain rule proposal for either the Council, or the Environment Court, to consider. In particular, there was no certainty as to the nature and scope of the re-vegetation requirements Thumb Point agreed would be necessary to justify a smaller lot size and achieve the objectives and policies Thumb Point said would be achieved. Thus, even if the Court had been required to undertake the type of assessment contended for by Thumb Point, it could not have done so.

[45] Mr Lanning submitted that the Environment Court had heard, and discussed in its decision, extensive landscape, ecological, economic and planning evidence. The Court's discussion touched on the broad range of resource management matters at issue. He submitted that it is reasonable to assume that the Court took all of this evidence into account when evaluating Thumb Point's proposed amendments.

[46] Mr Lanning submitted that the Environment Court was assessing the options of Thumb Point's "unspecified and (relatively) complex 15 ha rule framework", and the Council's "(relatively) clear and simple 25 ha rule framework". The Court properly concluded that there was no deficiency in the HGI Plan in the context of the present case, as the absence of provisions requiring re-vegetation in Landform 5 is explained by Landform 5's focus on retaining its capacity for productive use, and maintaining an open rural landscape. Thus it made sense that there was no requirement for re-vegetation on subdivision in Landform 5, and that it was not encouraged.

Discussion

[47] Thumb Point's appeal raises three main questions:

(a) Did the Environment Court have jurisdiction to consider Thumb Point's proposal as to subdivision in areas designated as Landform 5?

(b) If the Court had jurisdiction, did it refuse to exercise that jurisdiction and consider Thumb Point's proposal?

(c) Did the Court err in the way it decided Thumb Point's appeal?

Did the Environment Court have jurisdiction to consider Thumb Point's proposal?

[48] It is appropriate to begin by considering the extent of the Environment Court's jurisdiction on the appeal before it. Pursuant to s 290(1) of the Act, the Court "has the same power, duty, and discretion in respect of a decision appealed against … as the person against whose decision the appeal … is brought". Thus, the Court must have the power to determine the most appropriate method of achieving the objectives of the HGI Plan. Thumb Point argued that s 32 sets out a process which the Council is required to follow, but does not limit the jurisdiction of the Court to determine the overarching question if that process has not been followed. This is not disputed by the Council, which went on to argue that the Court did not apply s 32(3) as a limit to its jurisdiction.

[49] I accept as correct Thumb Point's submission that the Environment Court could determine this appeal, regardless of whether the s 32 process had been complied with. This is necessarily the case, in order to give effect to the Court's power under s 290(1), and has been recognised in, for example, *Kirkland v Dunedin City Council*.[23] Further, as said by Chisholm J in *Shaw v Selwyn County Council*, the Environment Court should not take an overly jurisdictional approach to an appeal, but should consider the merits of an appeal.[24] I am satisfied that the Environment Court had jurisdiction to determine Thumb Point's appeal.

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[23] *Kirkland v Dunedin City Council*, above n 21.
[24] *Shaw v Selwyn County Council*, above n 22.

Did the Environment Court consider Thumb Point's proposal?

[50] This question turns on what the Environment Court meant when it said:[25]

> *We cannot find in favour of [Thumb Point] on issue 1*. We simply observe that if in future there are to be proposals to loosen density controls in this part of Waiheke, it might be desirable if they take the form of a comprehensive suite of objectives, policies and methods. Naturally, we can make no prediction about the likelihood of such proposals.
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> (emphasis added)

[51] Thumb Point submits that in saying "cannot" in this paragraph, the Environment Court was making a finding that it was barred by s 32 of the Act from considering the real issue under appeal – namely whether Thumb Point's proposal was the most appropriate way to achieve the objectives of the HGI Plan.

[52] I do not accept that submission. The words used, while perhaps awkward phraseology, are commonplace in a situation where a court's conclusion is that a test has not been satisfied. In this case, in saying that it "cannot find in favour of" Thumb Point, the Environment Court was saying that it was not finding in favour of Thumb Point, because it was not satisfied that its proposal met the objectives of the HGI Plan.

[53] This conclusion is supported by reference to the Court's preceding comments:[26]

> Counsel for the Council explained [the lacuna or anomaly referred to at [26]-[30] above] by reminding us that Landform 5 is essentially concerned with an area providing for productive activities, and that is why 2.5.5.4 goes no further than the protection or enhancement of features, counsel stressed that the rather general provisions listed in [Thumb Point's] December 2013 memorandum are relatively high level provisions that apply across the plan, and must be read subject to the more specific objectives relating to Landform 5. Further that, with reference to 2.5.5.4, planting will not necessarily achieve a "positive environmental benefit" where it would displace otherwise productive land, unless intended for protection or enhancement of a <u>feature.</u> We consider that the council is correct in these submissions. The context of the structure of the general and the specific objectives explains the lacuna and underlines the limitations in objective 2.5.5.4. It might well be that in light of advancements in [outstanding

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[25] Environment Court decision, above n 2 at [76].

[26] At [74]–[75].

> natural landscape] protections at a regional level some strengthening of the district objectives would be desirable. But that is for the future and does not help [Thumb Point's] situation vis-à-vis s 32(3) at this time.
>
> Section 32 RMA is constructed in imperative terms ("must"). [Thumb Point] has drawn too long a bow in its submissions on this point. It is questionable whether the evaluations required by the section have been undertaken, but even if they have, we cannot be satisfied that the provisions advanced by [Thumb Point] are the most appropriate way to achieve the plan objectives as analysed by us above.
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> (emphasis as in original)

[54] It is clear from these paragraphs that the Environment Court directly considered s 32(3), and applied it to the situation before it. In accepting the Council's submissions, the Court rejected the arguments for Thumb Point, and concluded that its proposal was not the most appropriate way to achieve the objectives of the HGI Plan.

[55] Accordingly, I am not persuaded that the Environment Court treated s 32(3) as being a limit on its jurisdiction. It considered Thumb Point's proposal and concluded that it was not the most appropriate way to achieve the objectives of the HGI Plan.

Did the Environment Court make an error of law in rejecting Thumb Point's proposal?

[56] Thumb Point further submitted that the Environment Court had committed an error of law when determining the appeal, in that it incorrectly assessed the relationships between the different objectives of the HGI Plan. It submitted, in particular, that the Court wrongly interpreted objective 2.5.5.4 as applying only to existing vegetation. The Council contends that Thumb Point is in fact (wrongly) arguing questions of weight, which are not matters that can be raised on appeal. The Council further contends that the Court correctly identified and applied the relevant objectives, and appropriately balanced the competing interests which these represented.

[57] Despite the detail and nuance with which these arguments were advanced, this aspect of Thumb Point's appeal effectively reduces to one issue. The Environment Court concluded that the objectives of the HGI Plan related to

protecting the landscapes on Waiheke as they are at present. Thumb Point submits that the objectives should instead be interpreted as intending to preserve and improve the naturalness of the landscape in every case.

[58] The protection of the areas designated as Landform 5 is intended to preserve the unique character of those areas as productive – that is, working – farms. The intent of the objective is to preserve an environment which, while not entirely natural, is used for a particular purpose, in a certain way, and has a certain character. In order to give effect to the objective, development which undermines the particular character of Landform 5 has been limited. While Thumb Point's proposal may lead to a landscape which has more vegetation (and may be closer to the historical nature of the land), it is not consistent with the objectives of the HGI Plan.

[59] I am not persuaded that the Environment Court was wrong to reject Thumb Point's interpretation, or to approach the issue in the manner in which it did.

Result

[60] For the reasons set out above, Thumb Point's appeal is dismissed.

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Andrews J