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### Full Text of MAHER V MARLBOROUGH DC

Environment Court, W033/06  
15 May 2006  
Judge Kenderdine  
(6pp)

#### INTERLOCUTORY DECISION ON PRELIMINARY QUESTION OF LAW

##### *Introduction*

- [1] Mr Maher applied to the MDC for a water permit to take and use ground water from a well. The water permit was granted, but only for a term of 10 years. Mr Maher appealed the term of the consent only, asking for a term of 30 years. MDC raised a preliminary issue of law in its reply to the appeal, submitting that the relief Mr Maher seeks is not within the jurisdiction of this Court. The reason for that submission is that Mr Maher applied for a new water permit to replace an earlier one. The application for consent was made in the following terms:

Take                      MLB840007  
water as  
per  
U941517

- [2] MDC says that the permit was sought in terms similar to those previously applicable to permit U941517 and water right MLB40007. The only exception to that is that Mr Maher specifically sought an increase in the volume of water. Both the water permit and water right had been granted for 10 year terms. MDC suggested that, in accordance with the new application, the new water permit would be granted *as per* the preceding consents and subject to a similar time limitation.
- [3] I invited written submissions from the parties on this preliminary question of law.

##### *Fish & Game*

- [4] Nelson-Marlborough Fish & Game Council joined the appeal under s 274. Fish & Game submits that Mr Maher is restricted to a 10 year term of consent. The description of the activity in Mr Maher's application was "to take water as per U941517 MLB840007". That consent had a term of 10 years. Mr Maher's application only specified one condition he wished to change — namely the volume of water to be taken. Fish & Game understood, therefore, that the consent being applied for was on the same terms as the previous consent, except for the volume of water. Fish & Game proceeded on the assumption that Mr Maher would specify in the application any other conditions he wished to change.
- [5] Fish & Game submits that term of consent is part of the activity being consented, as it is a condition to which the consented activity is subject. It is a condition of the consent limiting the effectiveness of consent to a defined period of time<sup>[fn1 *Otauhu Auto Sales Ltd v Otauhu Borough Council* (1976) 6 NZTPA 168.]</sup>. The duration of consent is one of the conditions that prescribes the intensity and scale of the proposed activity. As such, it must be clearly stated in the application what maximum term is sought, so that all potential submitters have the opportunity to consider whether they wish to object.
- [6] Fish & Game submits, therefore, that changing the term from 10 years, to a term significantly longer than that, has the potential to affect the environment to a greater degree. It considers that a fresh application is required, setting out in more detail the conditions proposed. If a term longer than 10 years is sought, a more detailed assessment of the cumulative effects of the longer term consent is necessary.

##### *Marlborough District Council*

- [7] The MDC does not now pursue the jurisdictional issue raised in its reply. The MDC undertook a detailed analysis of Mr Maher's application when preparing submissions for the Court. In the course of that analysis, the MDC became aware that Item 5 of Fish & Game's submission specifically raised the question of the term of the consent. Mr Maher responded to that submission by way of letter dated 17 December 2004, and forwarded it to MDC. Mr Maher notes in that letter that the MDC Wairau/Awatere Plan allows up to 30 years for a consent for water to provide certainty to applicants.

- [8] MDC believes the letter might reasonably be regarded as further information provided by Mr Maher, which appears to indicate that the intended term of consent is 30 years. Notwithstanding that the information was provided after notification of the application and after the date submissions had closed, that letter clarifies the term of consent sought. The MDC believes it is unlikely that any additional parties would have filed submissions in opposition if they had become aware that Mr Maher sought a 30 year term rather than a 10 year term.

*Mr Maher*

- [9] Mr Maher argues that the object must be to determine whether or not the words used limit the scope of the application to a consent for no more than 10 years. The application says the water is to be taken "as per" the previous consent. There is nothing else in the application to suggest that the term is in any way to be limited. The application was completed by Mr Maher, and although economical, it was accepted as adequate.
- [10] Mr Maher submits that taking of water is not defined by reference to the term of consent, but by reference to the various conditions associated with the extraction of water from the nominated site. The term of the consent is not part of the activity in any sense of defining the way in which the consent is to be exercised. It is not material to the conduct of the activity during the period of consent.
- [11] Notably, the Planning Officer's report on Mr Maher's application specifically addresses the question of term. The officer did not suggest there was any constraints upon the matter of term arising from the application. Mr Maher submits that no others reviewing the matter would have formed a different view. Fish & Game made a submission requesting a limitation of term to 10 years. Mr Maher submits that it was not plain to Fish & Game that there was any limitation as to term in the application.
- [12] It is Mr Maher's submission that a limitation as to term was not plainly incorporated in the application. The reference to the activity is just that — the taking of water which had historically been taken. The term of 10 years was not plainly incorporated by that reference. Adopting the plausibility test<sup>[fn2]</sup> *Mills v Queenstown Lakes District Council* [2005] NZRMA 227., it is not plausible for either the MDC or Fish & Game to now suggest the application is constrained by the words used to a term of "not more than 10 years".

*Discussion*

- [13] The issue is whether Mr Maher is constrained by his application to a term of no more than 10 years. If Mr Maher's application does limit the term requested to 10 years, then this Court does not have jurisdiction to grant more than 10 years, as it has the same powers as the MDC on Mr Maher's application for consent<sup>[fn3]</sup> Section 290, RMA]. Also, if Mr Maher seeks more than 10 years, and it is not clear in terms of his application that a longer term was sought, it might be that others, who did not submit on the application, would have submitted if they had been aware that Mr Maher sought a longer term.
- [14] Mr Maher's application is very economical. The Assessment of Environmental Effects is six sentences long. Nevertheless, the application obviously contained sufficient information for the MDC to receive and process it. The only reference to time is this comment, in the Assessment of Environmental Effects:

We have been pumping water from this well for over 20 years, previously much greater quantities than at present.

- [15] Fish & Game's submission seeks a 10 year term of consent. Mr Maher replied to Fish & Game's submission in a letter dated 17 December 2004, noting that the MDC Wairau/Awatere Plan allows up to 30 years for a consent for water, to provide certainty. Mr Maher does not explicitly state that he seeks a term of 30 years, but it is at least implicit that he seeks a term longer than 10 years. This letter was in response to Fish & Game's submissions, but it was sent after the time for making submissions had ended.
- [16] Supplementary information required under s 92 RMA cannot enlarge an application, but it may limit or scope an application<sup>[fn4]</sup> *Clevedon Protection Society Inc v Manukau City Council* C 43/97, page 19.]. Also, where consistent with fairness, amendments to design and other details of an application may be made up to the close of the hearing<sup>[fn5]</sup> *Darroch v Whangarei District Council* A 18/93, page 27.]. Fish & Game's argument is that term is such a fundamental aspect of an activity that it should have been clearly spelled out in Mr Maher's application that he wished to have a resource consent granted for longer than 10 years. I agree in principle, noting Mr Maher's task was made difficult because nowhere on the council application form is there a request for term. That should be rectified on the forms urgently.
- [17] In this case, the timeline was:

- **application received**      **12 August 2004**
  
- **notification**                      **Unknown**
  
- **Fish & Game**                      **2 December 2004**  
**submission**
  
- **Mr Maher's letter**              **17 December 2004**  
**dated**
  
- **decision received**              **11 August 2005**

[18] I accept that Mr Maher prepared his application himself, and without regard to legal niceties. The MDC accepts that it was open to Mr Maher to seek a 30 year term, on the basis of his letter of 17 December 2004, and has withdrawn its opposition to Mr Maher's appeal on this jurisdictional ground.

[19] But the letter was sent after submissions closed, and while it might have clarified the application, it denied the submitter an adequate assessment of the situation. It was received too late to be considered part of the application. The only inference that can be drawn from Mr Maher's application is that he sought a term of 10 years, as per U941517 MLB840007. The only aspect for which Mr Maher specifically sought a change was the volume of water sought.

[20] While the indication of term is not in the nature of a (post-submission) increase in volume of water, or a change in the proposed use of the water, it will mean that the effects arising from the exercise of the resource consent will persist much longer than 10 years. This may have promoted a further response from Fish & Game, or other submissions.

*Conclusion*

[21] The letter of 17 December 2004 does not form part of the application for consent. It post dated the consent, and the submission period, and cannot be used as part of the matrix of documents considered in determining the scope of the consent sought. The only inference from the application for consent is that Mr Maher sought a ten year term, in line with his earlier water permit and water right.

[22] Therefore, the MDC did not have jurisdiction to grant a term of consent longer than ten years. On appeal, this Court likewise does not have jurisdiction to grant a term of consent for longer than ten years.

[23] Section 279 allows the Court to strike out a proceeding if it discloses no reasonable or relevant case. Mr Maher only appeals Condition 2 of the consent, limiting term to 10 years. The Court cannot grant the relief Mr Maher seeks — a consent term of 30 years. Therefore, there is no relevant case to answer.

*Order*

[24] I order that appeal ENV W 0148/05 be struck out.

[25] If any party seeks costs, applications should be lodged by 25 May 2006. Any reply should be lodged by 7 June 2006.