

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

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-715
[2022] NZHC 1282**

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under section 299 of the RMA against a decision of the Environment Court on appeal under section 12 of the RMA
BETWEEN	PRIMEPROPERTY GROUP LIMITED Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing: 18 May 2022

Appearances: S F Quinn and W M C Randal for the Appellant
N M H Whittington for the Respondent

Judgment: 1 June 2022

JUDGMENT OF COOKE J

[1] The appellant currently has advertising billboards at its site adjacent to State Highway 2 between Wellington and Petone. It does so in accordance with an existing resource consent. In December 2019 it lodged an application to vary the consent to enable the existing static billboards to be replaced with LED digital displays. The application was declined by the respondent in June 2020. The appellant appealed to the Environment Court, but by decision dated 29 October 2021 its appeal was declined.¹ The appellant now appeals on the basis that the Environment Court made errors of law in dismissing its appeal.

¹ *Primeproperty Group Ltd v Wellington City Council* [2021] NZEnvC 169.

Relevant facts

[2] The relevant facts can be described briefly. Those who undertake the drive between Wellington City and Petone will be familiar with the site. The appellant has advertising billboards on the left-hand side of the highway while travelling north. There are four large billboards — one facing the northbound traffic at one end, another facing the southbound traffic at the other end, and two further signs in a V-shape in the middle. They are static billboards illuminated by lights at the top.

[3] The appellant seeks to amend its resource consent in accordance with ss 104 and 127 of the Resource Management Act 1991 (the RMA). It wishes to replace the two billboards at either end of the site with digital billboards of about the same size. These digital billboards will still display static digital images but those images will regularly change. The proposal before the Environment Court was that not only the existing billboards at each end would be replaced with digital billboards, but the V-shaped billboards in the middle would also be removed.

[4] Waka Kotahi New Zealand Transport Agency (Waka Kotahi) was an interested party under s 274 of the RMA. It opposed the application for road safety reasons. The Wellington City Council declined the application after a hearing, essentially because of road safety issues arising from additional driver distraction. On appeal to the Environment Court, Waka Kotahi assumed the principal role in opposing the appellant's appeal.

[5] As indicated the Environment Court dismissed the appeal. It focused on the effects of the application in accordance with s 3(d) and (f) of the RMA. Its conclusions were summarised in the following way:

Conclusions

[46] We are conscious of course that there are existing static billboards, and that they will have some degree of attention taking and possible distraction. We do not need to offer any view as to whether we might have granted consent for them, if they had been the subject of the application. What this matter is about is the proposed change to something different.

[47] Bringing all of the material together, there are a number of factors which, taken together, strike us as being decisive. First, in considering traffic on this stretch of road, it is perhaps easy to over-emphasise cyclists and their

safety. Certainly they are more vulnerable in the event of a collision and their safety is a factor – but they should be considered as one (numerically rather small) part of the whole traffic picture. As it is now, the northbound lane of this stretch of highway – Ngaraunga to Petone is in the top 10% of roadway networks with the highest deaths and serious injuries in the country.

[48] Secondly, the sole purpose of advertising billboards is to attract the attention of those who come within viewing range of them, and to hold that attention for long enough to instil in the viewer the notion that the product being advertised is attractive and is something to be put on the viewer's *to-do* list.

[49] Thirdly, the proposed change is to a medium that will change the image on screen many times during the course of each 24 hours. They will change while a vehicle is on the stretch of road in which they are visible – meaning that there will, in that instance, be two messages to be seen and considered. Even if the image does not change while any one driver is passing through the visibility range, it will be likely that on subsequent passages through the range, that driver will see a different message, and there will not be a *seen that before* dismissal of interest.

[50] Fourthly, it may be reasonably assumed that the owner of a digital billboard will be prepared to pay the cost of acquiring it, and the cost of installing it, because advertisers will be prepared to pay the cost of using a digital billboard because of the expectation that it will attract the attention of the viewers more than might be expected of a static billboard.

[51] Fifthly, while drivers of passing vehicles are looking at, and thinking about, the advertisements on the billboard, they are not paying full attention to the task of driving safely on a stretch of road that is one of the most dangerous roads in the country.

[52] Further, if there was to be a crash where digital billboard distraction was identified as being a contributory factor, we find that the proposed amended monitoring and reporting conditions cannot be relied on to prevent subsequent distraction related crashes from occurring unless the billboards are turned off. This is not offered in the conditions. If the billboards were to continue to operate, the risk of further distraction related crashes would remain.

[53] In terms of the two components of risk, probability and consequence, while the evidence is that the probability of a digital billboard distraction related highway crash is low, we find the potential consequences of a crash attributed even in part to this cause to be unacceptable on a 70,000 plus vehicle per day state highway where the crash record from other causes is already at a very high level.

Section 290A RMA

[54] Section 290A requires the Court to ... *have regard to* ... the decision which is the subject of the appeal. That does not mean that there is a presumption that the decision is correct, or that an appellant has an onus to show it to be incorrect. It simply means that we must give the decision, and its reasoning, genuine consideration in coming to our own view. The essence

of the Commissioner's decision is, we think, captured in paragraphs [95] and [96] of his decision of 30 October 2020:

[95] ... I consider the conversion of static billboards to digital format at this site carries an increased risk of adverse road safety effects

[96] I find that, on the evidence, this is not an appropriate location for introducing a new element of potential distraction to motorists. Overall, I concur with Ms Kelly that this is a situation where it is appropriate to take a precautionary approach.

Result

[55] On our review of the material put before us which, while essentially similar, had some variations and additions to what was put before him, we have come to the same conclusions as did Mr Rae, and for essentially the same reasons. In short, the proposed billboards will add a further element of risk to an already high-risk piece of the road network, without providing any public benefit. The resource consent should be declined.

[6] The appellant has a right of appeal under s 299 of the RMA Act on a question of law. There is no material difference between the parties on the scope of such an appeal.² The appellant here raises five alleged errors of law, namely that there was:

- (a) a failure by the Environment Court to provide adequate reasons;
- (b) an error, or failure to take into account a relevant consideration, in relation to the removal of the V-shaped billboards;
- (c) a finding based on an assumption despite conflicting expert evidence (or a failure to take into account a relevant matters) on the key issues concerning driver distraction;
- (d) a misapplication of the correct legal test under ss 104 and 127 of the RMA, or taking into account irrelevant considerations, including by:
 - (i) not limiting its findings to the effects of the change; and
 - (ii) considering the public benefit when this was not part of the legal test; and

² See *Otago Fish & Game Council v Otago Regional Council* [2021] NZHC 3258 at [47]–[54]; *Speargrass Holdings Ltd v Van Brandenburg* [2021] NZHC 3391 at [110]–[116].

- (e) a breach of natural justice by the Court relying on certain expert evidence without giving the appellant the opportunity to challenge that evidence by cross-examination.

[7] The respondent to the appeal is now the Council. Waka Kotahi took no part on this appeal.

Analysis

[8] Although the appellant raised five suggested errors of law (with the fourth one further broken down into sub-issues) many of the grounds overlap and I am able to address the alleged errors reasonably concisely.

Adequacy of reasons

[9] It is well established that a failure to give adequate reasons can be an error of law. That is so of decisions under the RMA. In *Murphy v Rodney District Council* Baragwanath J explained:³

The Privy Council in *R v Taito* [2003] 3 NZLR 577, 599 para [17] endorsed the observations of the Chief Justice in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, 565-567 paras [74-82] as to the duty of a decision-maker to give reasons. Of present relevance are the points that failure to give reasons means that the lawfulness of what is done cannot be assessed by an appellate Court; and that the duty to give reasons requires the decision-maker to outline the intellectual route taken, which provides some protection against error. The reasons may be succinct; in some cases they will be evident without express reference.

[10] In a similar vein in *Maungaharuru-Tangitu Trust v Hastings District Council* the Court more recently said:⁴

The standard for the duty to give reasons depends on the particular circumstances and the statutory context. Where there is a straightforward factual dispute, no more may be required than simply stating whether the Judge believes one witness over another.⁵ Where the dispute is more complex with reasons and analysis on either side, the Judge must engage with the issues, analyse the evidence and make reasoned findings. Reasons might be abbreviated and evident without express reference.⁶ But generally, reasons

³ *Murphy v Rodney District Council* [2004] 3 NZLR 421 at [25].

⁴ *Maungaharuru-Tangitu Trust v Hastings District Council* [2019] NZHC 2576 at [21]–[22].

⁵ *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA) at 382.

⁶ *Housing New Zealand v Auckland Council* [2018] NZHC 288, (2018) 20 ELRNZ 441 at [81].

ought to state the material findings of fact and evidential support and must tell the parties why they lost or won.⁷ The reasons should be sufficient to enable those affected to understand why the decision was made and to be satisfied it was lawful.⁸

Whether or not sufficient reasons are given depends on the legal question, and complexity of the legal issue. In some contexts a court or tribunal is required to engage in a particular analysis. It is only by the reasons given that it can be seen that the required analysis has been undertaken. ...

[11] Mr Quinn said there has been a failure to properly engage with the issues in the present case. The issue concerning alleged driver distraction was a complex one. Two experts had been called by the appellant addressing scientific research on safety effects of billboards and the road safety considerations more broadly. Such an expert had also been called by Waka Kotahi addressing the effects of billboards, their influence on accident records, and the operational characteristics of digital billboards. These experts prepared a joint witness statement recording the areas of agreement and disagreement. There was also evidence from human behaviour experts, one called by Waka Kotahi, and one from the appellant, and they had also prepared a joint witness statement with the areas of agreement and disagreement identified. Mr Quinn argued that the Environment Court engaged in very little examination of this evidence, and made no attempt to engage in the complexities of road safety and human behaviour that had been raised by the parties. It was not possible to understand why the Court had reached the conclusions in light of the conflicting evidence, and the Court did not explain why it preferred the views of some experts over others. It didn't enter into the issues addressed by the expert evidence by analysing them, weighing or evaluating them, and then explaining why it preferred one expert over the other.

[12] I do not accept these arguments. As the authorities explain, the duty to give reasons, or to engage in a particular line of analysis, is contextual. Unlike some RMA cases the issue here was a limited one. Did the digital billboards involve a materially greater risk of driver distraction leading to a greater risk of an accident? If it did then the application could properly be declined, particularly given the dangerous nature of this stretch of road, including because of the existence of cyclists.

⁷ *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 at [70], citing Stanley De Smith, Harry Woolf and Jeffrey Jowell *Judicial Review of Administrative Action* (5th ed, Sweet & Maxwell, London, 1995) at 9-049.

⁸ At [73], citing *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at [80].

[13] In addressing that matter the Environment Court can have been expected to apply judgment, and its expertise. The Environment Court Judge and the Commissioner can be expected to apply their knowledge and experience. The Court has reached its conclusions on the key issues without addressing the very detailed road safety and human behavioural expert evidence in the conclusions. But given the nature of the issue it cannot be said that it was essential that it address those more detailed matters. It was able to form its views for the more robust reasons set out in the judgment. It cannot be a requirement that the Environment Court descend into the analysis conducted by experts simply because they are called by a party. It depends on the context of the issues. Short judgments that get straight to the point are to be encouraged.

[14] There is also no doubt about the reasons for the Court's conclusions. To use the language applied by Baragwanath J the "intellectual route taken" is clear. That route does not rely on an analysis of the expert evidence, but that is apparent. The parties know why the Court has reached its conclusions because this is explained in the reasons. It is set out in paragraphs [46]–[55] quoted above, although there are earlier paragraphs that also contribute to the reasoning. The parties know why they have won and lost.

[15] This ground of appeal is not made out.

Error concerning application

[16] The second alleged error of law arises from an alleged misunderstanding of the basis of the application. There had been a modification of the proposal originally made to the Council. The appellant changed the application so that it would remove the two billboards in the V-shape in the middle when replacing the two billboards at each end with LED billboards. This meant there was a reduction in the total number of billboards being seen by motorists if the application was granted.

[17] Mr Quinn argued that the Environment Court had failed to understand this, and that this involved error of fact, and a failure to take into account a mandatory relevant consideration.

[18] This submission was based on paragraph [5] of the decision under appeal which states:

In brief, the proposed amendment to the consent would allow the northernmost and southernmost billboards to be replaced by digital billboards of about the same size as the existing ones. They will display (as do the existing static billboards) commercial third-party advertising. **The applicant, Prime, suggests that the existing V-shaped billboards towards the middle of the site may be removed if the proposal is granted consent - this being a modification of the proposal after the Commissioner's decision.** There is also a suggestion by Prime that it might create a separate cycleway along its land - separate from the roadway and inside the existing guard rail - to lessen possible risk to cyclists.

(Emphasis added)

[19] Mr Quinn argued that the use of the word “may” involved a misunderstanding — it was not a question of the billboards in the V-shape possibly being removed, rather that they were definitely being removed as part of the proposal. The word “may” was erroneous. This flowed through into the reasoning of the Court — for example at paragraph [49] the Court addressed the change in the number of times motorists would see images without addressing the fact that the number of signs was being reduced.

[20] I accept that a fundamental misunderstanding of an application might in some circumstances be a misdirection that amounts to an error of law. But I do not accept there has been such a misunderstanding here. The removal of the two V-shaped signs in the middle was repeatedly referred to in the materials before the Court, so it is inherently unlikely that the Court did not understand this, or thought that removal was in some way optional. That would have been a very unusual misunderstanding. As Mr Whittington submitted the word “may” in paragraph [5] can be read as meaning “can”, rather than it suggesting that removal was optional. That is reflected in the later reasoning. In paragraph [55] the Court identifies that there were variations and additions to the proposal. At [49] the Court has focused on the question of whether digital billboards are more distracting than the existing billboards. In context the Environment Court did not think the removal of the two billboards in the middle was material. It may have been better for it to say so expressly, but I do not accept it involves a fundamental misunderstanding of the application.

[21] This ground of appeal is not made out.

Improper assumption

[22] Mr Quinn argues that the Court was in error because its decisive conclusion was based on an assumption rather than a finding on the conflicting expert evidence. He focused on paragraph [50] in which the Court had found that it could be “reasonably assumed” that the additional costs of installing LED billboards were going to be met because they would be more likely to attract attention than static billboards such that advertisers would pay more.

[23] Again I do not accept this criticism. I do not agree that the Court has reached its conclusion based on assumptions. It has reached its conclusion based on its findings on the key questions of fact. As indicated above it seems to me that the key issue here was a reasonably straightforward one, and that the Court has reached a robust conclusion on it. It was not necessary for the Court to descend into a detailed analysis of expert evidence in order to reach that conclusion.

[24] I accept that paragraph [50] can be criticised. As I understand it the point being made — that the very reason the appellant would be prepared to pay the cost of installing LED billboards was that advertisers would pay more for the additional attention involved — was not raised by any parties, or by the Court at the hearing. Had that point been raised there may have been an answer to it — that there would be additional revenue for other reasons, such as the greater number of advertising images that could be displayed. But in any event, the Court’s comment on this matter was not central to its reasoning. It explained why it had found that the digital billboards would be more distracting for drivers in the other paragraphs. Paragraph [50] was an additional observation. I see it as no more than that.

[25] This ground of appeal is not made out.

Incorrect test

[26] The fourth alleged error involves a series of alleged failures in relation to the appropriate test to be applied under ss 104 and 127. Section 104 provides the considerations the consent authority must have regard to when considering applications for a resource consent. Section 127 provides for changes or cancellations

of consent conditions. I focus on two of the specific arguments advanced by Mr Quinn under this head.

[27] First Mr Quinn argued that the Court had failed to limit its consideration to the effect of the change in the consented activity as required,⁹ and that much of its reasoning centred on the distracting nature of billboards in themselves which was not the proper focus.

[28] I do not accept this. I agree that the application is concerned with the effect of the change. But the Court makes it clear that it understands that it is dealing with an application to change the existing consented activity, and that the existing static billboards “will have some degree of attention taking and possible distraction”.¹⁰ In the following paragraphs it focuses its findings on the effect of the change from static to digital billboards. That focus is particularly evident from paragraph [49]. The fact that it has analysed the existing environment, and the nature of distraction by billboards generally, is a necessary aspect of analysing the impact of the change. For example the findings that this is an inherently dangerous stretch of road is a necessary aspect of considering the implications of the change.¹¹ I do not see that there has been any error in the Court’s approach.

[29] Secondly Mr Quinn argued that there was an erroneous reference in paragraph [55] to the public interest. The Court found that the proposed billboards added a further element of risk “without providing any public benefit”. Mr Quinn argued that public benefit was not in issue in this case, and that this was not part of the statutory test.

[30] But public benefit is not an irrelevant consideration under that test. If there had been some public benefit arising from the proposed activities then they could have been added into the mix in assessing this application. So there is nothing erroneous in the Court noting there were no countervailing considerations of this kind.

⁹ Relying on *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [181].

¹⁰ *Primeproperty Group Ltd v Wellington City Council*, above n 1, at [46].

¹¹ At [47].

[31] Mr Quinn generally argued that the Court had not properly understood the statutory test to be applied by it, raising some other more subtle points. But generally I do not accept that the Court misunderstood the legal test.

[32] This ground of appeal is not made out.

Breach of natural justice

[33] Finally Mr Quinn argued that there had been a breach of natural justice in the way the hearing had proceeded. At an earlier judicial telephone conference concerning the appeal an Environment Court Judge (not the Judge that heard the appeal) indicated that the Court would not be greatly assisted by hearing oral evidence from the expert planning witnesses. The parties subsequently advised the Court that the planning witnesses would not be called, and that their evidence could be taken as read. Those witnesses, who addressed the safety effects, cumulative effects and the applicability of the precautionary principle were accordingly not called and cross-examined. Yet in the consideration of the effects of the application in paragraphs [29]–[31] of the decision the Court indicated it agreed with the evidence of Waka Kotahi’s planner. Mr Quinn argues that that was inherently unfair given the Court’s earlier indication.

[34] I see no substance to this point. The appellant elected not to cross-examine the planning witnesses who gave evidence in opposition. There was no breach of natural justice in the Court failing to allow cross-examination because no such application was made. The earlier observation by a different Judge was made for the assistance of the parties, and cannot be criticised. The appellant was free to seek to cross-examine any of the witnesses at the hearing. The appellant must live with the tactical decisions it has made. Moreover the evidence was duly placed before the Court even though there were differences between the planners. There can be no criticism of the Court relying on aspects of that evidence to the extent it found it of assistance.

[35] This ground of appeal is not made out.

Conclusion

[36] This was a relatively straightforward application to amend the conditions of a resource consent. The Environment Court agreed with the decision made by the Council that replacement LED billboards were more distracting for drivers in the context of a stretch of road that is regarded as a dangerous one. It declined the application as a consequence. It was not a complicated issue and the decision was plainly open to the Environment Court to make. The suggestion that the decision involved errors of law is artificial. None of the grounds of appeal are made out.

[37] The appeal is accordingly dismissed. The respondent will likely be entitled to costs on a 2B basis. If this cannot be resolved I will receive memoranda.

Cooke J

Solicitors:
DLA Piper, Wellington for the Appellant