IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2005-485-1961

UNDER	the Land Valuation Proceedings Act 1948
IN THE MATTER OF	a decision of the Land Valuation Tribunal at Wellington dated 9 September 2005
BETWEEN	NEVILLE ALBERT BLAIR Appellant
AND	UPPER HUTT CITY COUNCIL Respondent

CIV-2005-485-2268

AND UNDER	Part 7 of the High Court Rules
BETWEEN	NEVILLE ALBERT BLAIR, ANNE FRANCES HYDE AND BRIAN ROSS Plaintiffs
AND	UPPER HUTT CITY COUNCIL First Defendant
AND	QUOTABLE VALUE LIMITED Second Defendant

Hearing: 29 May 2006

Appearances: G D S Taylor for Appellant/Plaintiffs
N Levy for Respondent/First and Second Defendants

Judgment: 21 June 2006 at 3 pm

In accordance with r 540(4) I direct the Registrar to endorse this judgment with a delivery time 3.00 pm on the 21st day of June 2006.

JUDGMENT OF CLIFFORD J

Application for directions

[1] On Monday 29 May I heard an application for directions as to the order in which appeal and judicial review proceedings, relating to decisions by the first and second defendants with regard to the rating status of a property owned by the appellant/plaintiffs, should be heard.

[2] Very briefly, the background to that application is as follows:

a) On September 2001, and with stated effect from July 2001, the first defendant altered the classification of Brentwood Manor, a property owned by the plaintiffs as trustees, of whom the appellant is one. That alteration changed the classification of Brentwood Manor from residential to business.

b) Sometime later, the second defendant – at the first defendant's request – made an apportionment of Brentwood Manor as between business and residential use of 70:30. Subsequently, and following the appellant's objection, that apportionment was altered to 65:35.

c) The appellant then objected to the Land Valuation Tribunal, which on 8 September 2005 dismissed the appellant's objection.

[3] Against that background, two sets of proceedings have been commenced:

a) In CIV-2005-485-1961 ("the appeal proceedings") Mr Blair, representing the plaintiffs as trustee owners, appeals against the decision of the Land Valuation Tribunal which dismissed his objection to the initial amendment of the rating roll to reflect the allocation of Brentwood Manner to the business differential, and to the subsequent apportionment decision.

b) In CIV-2005-485-2268 ("the review and damages proceedings") the plaintiffs as trustee owners of Brentwood Manor have applied to review the relevant decisions of the first and second defendants, and have also claimed for damages in negligence and for misfeasance in public office from the first defendant and for damages in negligence from the second defendant.

[4] In responding to the review and damages proceedings both the first and second defendants have applied, on various grounds, to strike out the plaintiffs' claims.

[5] A joint memorandum of counsel filed for the purposes of the directions hearing raised a number of issues. As matters developed before me, it was agreed that the appeal proceedings should be heard before the review and damages proceedings. It was less clear that there was agreement between counsel as to the appropriate timing of the strike out applications. The particular issue on which directions were sought was:

a) whether, as submitted for the appellant/plaintiffs, the two sets of proceedings should be heard consecutively, one immediately following the other, so that the outcome of the appeal proceedings would not be known to the Court (unless an oral decision were to be given) when the review and damages proceedings were heard; or

b) whether, as submitted for the respondent/defendants the review and damages proceedings should only be heard once the outcome of the appeal proceedings had been determined.

[6] For the appellant/plaintiffs, Mr Taylor presented his submissions as an application under r 382 of the High Court Rules for the proceedings to be heard "one after the other". Mr Taylor, in fact, had a preference for both matters to be heard together but recognised that given the different constitution of this Court on appeal from the decision of the Land Valuation Tribunal – where the Judge sits with a registered valuer, as opposed to its constitution for the purposes of the review and damages proceedings - where as usual the Judge sits alone, that was not in fact possible.

[7] For the defendants, Ms Levy characterised the matter more in terms of a general application for directions that the appeal proceedings be heard and disposed of before the review and damages proceedings be heard.

Relevant law

[8] The recent Court of Appeal decision in *Telecom NZ Ltd v Christchurch City Council* CA25/04 7 March 2005 provides the immediate context. In that decision, the Court of Appeal held that the jurisdiction of the Land Valuation Tribunal was limited to forming a view as to the correct valuation of the land in question in any proceedings before it. The Tribunal was not competent to undertake the sort of analysis which a High Court Judge would undertake on an application for review under the Judicature Amendment Act 1972. The Tribunal's function is simply to assess the rating value of the relevant property, when objections to a Rating Authority's decision on that point are referred to it.

[9] Where there is, therefore, concurrent appeal and judicial review proceedings in respect of a local authority's rating decision, a full resolution of the issues may depend on the outcome of both proceedings.

[10] The Courts have, on many occasions, considered the relationship between appeal and judicial review proceedings relating to the same decision. The general principles may be stated as follows:

a) The mere pendency of judicial review proceedings in respect of a reviewable decision will not deprive a specialist appellate body considering an appeal from that decision of jurisdiction – *Slipper Island Resort v Number One Town and Country Planning Appeal Board* [1981] 1 NZLR 143 (CA) at 145; *Reid v Rowley* [1977] 2 NZLR 472, 481-483.

b) In judicial review proceedings, however, the High Court may refuse relief where the applicant has an alternative remedy such as a statutory right of appeal - Joseph *Constitutional and Administrative Law in New Zealand,* Brookers (2ed 2001) at para 25.4.5. Thus, a subsequent de novo reconsideration of, or appeal from, a legally flawed initial decision may be capable of curing that defect – see, for example, *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 at 43-44. At the same time, an unsuccessful rehearing or appeal may not oust the right of review where the applicant alleges unlawful conduct – see, for example, *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 at 43-44 and *BASF v Commissioner of Inland Revenue* [1994] 1 NZLR 172. This is a matter in the discretion of the Courts.

[11] In terms of the specific context provided by the *Telecom* decision (above), and those more general principles, the relationship between the two sets of proceedings in this case would appear to be as follows:

a) If the appellant's appeal against the Land Valuation Tribunal decision is dismissed, and the first and second defendants' decisions upheld to that extent, the scope for judicial review and damages actions would appear to be, at least potentially, significantly affected. The rating

merits – for want of a better phrase – of those decisions having been upheld, the plaintiffs would perhaps seek to focus their challenge on the procedural and other legal irregularities they allege in the decision-making processes.

b) By contrast, if the appellant's appeal against the Land Valuation Tribunal decision succeeds, the question would then be what further relief might be available to the plaintiffs in terms of the damages aspects of the review and damages proceeding. At the same time, the defendants' strike out applications would certainly need to be reconsidered, and the defendants' general attitude to the review and damages proceedings could be significantly affected.

[12] In the *Telecom* decision, the Court of Appeal noted that, in addition to referring matters to the North Canterbury Land Valuation Tribunal, Telecom had also issued judicial review proceedings. Those proceedings were stayed by the High Court, on the basis that the Land Valuation Tribunal would be able to resolve validity issues. When the Court of Appeal subsequently confirmed that those matters were outside the jurisdiction of the Land Valuation Tribunal, the Court of Appeal commented on where those judicial review proceedings may have led to, had they been allowed to continue.

[13] The Court of Appeal reflected on the possible outcomes of such proceedings in the following terms:

> [58] The following outcomes were possible: First, Telecom may not have been able to substantiate the attacks it made on the processes leading up to the 1998 and 2001 valuations.
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> [59] Secondly, even if Telecom showed that the processes leading to the valuations were defective, it is highly likely that the High Court would have held that a hearing de novo before the tribunal would cure any deficiencies and that the High Court would have simply declined relief in its discretion under the Judicature Amendment Act 1972, s 4(3): *Slipper Island Resort Limited v Number One Town and Country Planning Appeal Board* [1981] 1 NZLR 143 (CA) at 145; *Smith v Waikato County Council* (1983) 9 NZTPA 362 (HC); *McNaughton v Tauranga County Council* (No 2) (1987) 12 NZTPA 429 (HC); *Commissioner of Inland Revenue v Dandelion Investments Limited* (2001) 20 NZTC 17,293 (HC) at [57]. We accept that those cases involve in the main appeals in circumstances where it was

> argued natural justice had been denied at first instance. But in our view, the principle holds good by analogy. Indeed, it could be said the principle applies a fortiori here given that the tribunal's hearing is de novo with none of the restrictions normally inherent in an appeal process.
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> [60] Thirdly, it is possible that the High Court would have ordered the council's valuer to revalue the infrastructural assets. We know that would not have been to Telecom's advantage because we know, on the basis of evidence Telecom itself put before the tribunal at the preliminary hearing that, if anything, the council's valuer *seriously undervalued* Telecom's infrastructural assets as at 1 September 1998.
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> …
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> [63] For these reasons, we consider that the application for review proceeding was doomed, at least in the sense of providing Telecom with a remedy of practical advantage. We think this is what Chisholm J had in mind. He clearly considered that the objection process would "cure the pleaded defects": at [43]. We take that to mean that the objection process would lead to a value being struck in accordance with the approved valuation methodology.

[14] I note the Court of Appeal's comment that possible parallel or subsequent application for review proceedings were doomed, at least in the sense of providing Telecom with a remedy of practical advantage. I should make it clear that I am not indicating any view on that issue in this instance. I note, in particular, that if the review proceedings established, for example as alleged by the plaintiffs, that the initial rating decision was made by an officer acting without delegated authority, then the question of whether and to what extent, and with effect from when, the subsequent correct decision of the Land Valuation Tribunal "cured" that defect would need to be considered in the circumstances of this case.

[15] All this leads me to the conclusion that the efficient and fair resolution of these matters would be best promoted if the decision of this Court on appeal from the Land Valuation Tribunal has been determined and is available before the review and damages proceedings, and associated strike out applications, are heard. I think that this approach is consistent with those decisions which indicate a preference for appeal rights being exercised in preference to judicial review claims, whilst at the same time accepting, particularly in light of the *Telecom* decision, that the appeal against the Land Valuation Tribunal's decision may be unlikely, in this instance, to address all the concerns the appellant/plaintiffs have with the actions of the Upper Hutt City Council.

Conclusion

[16] Accordingly, I direct that the appellant's proceeding CIV-2005-485-1961 be heard and determined prior to the hearing of the plaintiffs' proceeding in CIV-2005-485-2268, including the defendants' strike out applications. The sensible course of action would be for counsel to file a joint memorandum once the outcome of the appeal proceedings is available. It was agreed by Mr Taylor and Ms Levy that it would be preferable for the same Judge to hear both maters. I agree with that, but do not consider that is a matter for my direction. I will, however, so recommend.

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Clifford J

Solicitors:
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B R Dodson, City Solicitor, Upper Hutt City Council