BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKAURAU

Decision No. [2020] NZEnvC 135

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for review under s 294 of the Act
BETWEEN	THI LAN ANH TRAN (Trading as Hanoi Vietnam Café)
	(ENV-AKL-2018-090)
	Applicant
AND	CITY RAIL LINK LIMITED
	Respondent

Court:	Environment Judge D A Kirkpatrick, sitting alone under s 279(1)(h) of the Act
Hearing:	on the papers
Date of Decision:	21 August 2020
Date of Issue:	21 August 2020

DECISION OF THE ENVIRONMENT COURT
ON FURTHER APPLICATION FOR REVIEW

A: The application for review is refused.

B: There is no order as to costs on this application.

REASONS

Introduction

[1] The applicant, Thi Lan Anh Tran (**Mrs Tran**), applies a second time for review of the Court's decision[1] refusing her appeal under s 174 of the Resource Management Act 1991 (**RMA**) against a decision of City Rail Link Ltd (**CRLL**) as a requiring authority on its notice of requirement in respect of the Auckland City Rail Link.

[2] The Court in that case was constituted by his Honour Judge Newhook (who was at that time the Principal Environment Judge) and Environment Commissioner Hodges. That decision was the subject of an appeal to the High Court which was refused[2] and an application to the Court of Appeal for leave to appeal which was declined.[3] The background and detail relating to this matter is fully set out in those three decisions and I do not repeat it here.

[3] After the Court of Appeal had declined leave for a second appeal, Ms Tran applied on 15 June 2020 to this Court to review the original decision under s 294 of the RMA. That application was referred to Judge Newhook and Commissioner Hodges as the original panel of the Court who had heard and determined Ms Tran's appeal, consistent with the Court's usual practice with such applications.

[4] On 8 July 2020 (the day after (now) Alternate Judge Newhook ceased to be the Chief Environment Court Judge[4] and the day that I was appointed to that role) Ms Tran asked for her application to be transferred to me as the Principal Environment Judge. That did not occur.

[5] On 6 August 2020 the Court delivered its decision refusing the application for review.[5] That decision includes the following paragraph (footnote omitted):

> [4] Chief Environment Judge Kirkpatrick is aware of the application, but exercising his powers under s251(2) RMA has directed the original panel of the Court proceed to deal with it for two reasons. First, in the usual course such panel would deal with subsequent costs applications (there are 2 extant) and this kind of application. It is the more appropriate in the present case given our knowledge of the enormous detail of material placed before the Court by Ms Tran previously, to enable us to compare it with what she has filed now. The other reason is that Courts resist

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1 *Hanoi Vietnam Café v City Rail Link Ltd* [2019] NZEnvC 094.

2 *Tran v City Rail Link Ltd* [2019] NZHC 2739.

3 *Tran v City Rail Link Ltd* [2020] NZCA 174.

4 The title of the head of the Environment Court bench was amended on 1 July 2020 by section 70(1) of the Resource Management Amendment Act 2020.

5 *Tran v City Rail Link Ltd* [2020] NZEnvC 118.

> "jurisdiction shopping" whereby parties endeavour to choose Judges to hear cases.

[6] On 12 August 2020 Ms Tran repeated her request that her application be transferred to me. On 14 August 2020 a registry officer replied, advising Ms Tran that:

(a) the Court had made its decision on her application;

(b) it was pointless continuing to file and re-file it;

(c) paragraph [4] of the decision stated the Court's position; and

(d) the Court would now finalise the outstanding costs decision from the original hearing.

[7] Later that day Ms Tran sent a message directed to me, including the following:

> As a result, the Appellant sent again the Appellant's Application to the Principal Environment Judge David Kirkpatrick dated 8 July 2020. Until today, dated 12 August 2020, the Appellant have not received any response from the Environment Court Auckland under the new management of the Principal Environment Judge David Kirkpatrick. The Appellant needs to send the Appellant's Application to the Principal Environment Judge David Kirkpatrick the third time in order (i) to reveal to the Principal Environment Judge David Kirkpatrick the errors of law made by the former Principal Environment Judge Laurie Newhook in relation to decision No [2019] NZEnvC074 dated 12 April 2019 that directly affects to the Appellant's appeal dated 18 May 2018 and affects to the Appellant's business, and (ii) to achieve Fairness and Justice that the Appellant is seeking for last three years.

[8] In light of that I will pick up Ms Tran's application, notwithstanding that it has already been decided by the Court, in order to address the matters she now raises.

Issues

[9] Ms Tran's message of 12 August 2020 raises the following identifiable issues, which I will address in turn:

(a) New management at the Court;

(b) Errors of law in the original decision;

(c) Effects on Ms Tran's business; and

(d) Fairness and justice.

[10] The suggestion that an application be considered by "new management" at the Court is misconceived. The Environment Court is established by s 247 of the RMA, which relevantly provides:

> There shall continue to be a court of record called the Environment Court which shall be the same court as the court called the Planning Tribunal immediately before the commencement of this section …

[11] This provision makes it clear that the Environment Court is a continuing institution. The Court has members who sit in it and who do the things that the Court must or may

do as well as other officers (registry staff and counsel) who assist in those things, but those members and other officers are not the institution which exists separately and distinctly as a court of New Zealand.

[12] While one of the judges of the Court is appointed under s 251(1) of the RMA to be the Chief Judge, that role is an administrative one as discussed further below. Each judge is individually responsible for their actions as a judge, including their role, with Environment Commissioners, in making decisions of the Court. When a judge (including the Chief Judge) retires, others continue (including whoever is appointed to be the new Chief Judge) and so the Court continues as envisaged by s 247 of the RMA. This is not at all a matter of "new management" at the Court: unlike what may occur at a restaurant when a new chef is hired, there is no change in what the Court does or, fundamentally, how it does it when a new chief is appointed.

[13] There are other reasons why raising this issue of "new management" is incapable of being a basis for review. The ordering of the business of the Court is an administrative matter for the Chief Judge under s 251(2) of the RMA, which provides:

> (2) The Chief Environment Court Judge shall be responsible for ensuring the orderly and expeditious discharge of the business of the court and accordingly may, subject to the provisions of this or any other Act and to such consultation with the Environment Judges as is appropriate and practicable, make arrangements as to the Environment Judge or Judges and member or members who is or are to exercise the court's jurisdiction in particular matters or classes of matters and in particular places and areas.

[14] It was under that provision that I directed Judge Newhook to continue with this proceeding. In making that direction I took into account that he and Cr Hodges were best placed to deal with Ms Tran's application for review efficiently because of them having heard the appeal as well as having been on the panel of the Court that reviewed the original designations.[6]

[15] In relation to my direction it is also important to cite s 266 of the RMA:

> (1) It is in the sole discretion of the member of the Environment Court presiding at a sitting of the court to decide whether the court has been properly constituted and convened.
>
> (2) The exercise of discretion under subsection (1) may not be questioned in proceedings before the court or in another court.

[16] Having directed that Judge Newhook preside in respect of Ms Tran's application and he and Cr Hodges having heard and determined the application, it is not now open

6 *Tram Lease Ltd v Auckland Transport* [2015] NZEnvC 191.

to Ms Tran or anyone else to question that constitution and convening of the Court.

[17] Ms Tran appears to misunderstand these matters. Possibly she thinks that she may get a different result if she can put her case in front of a different judge. As noted in the Court's first decision on this application, that alone is a sufficient ground to refuse her request. Just as it is fundamental to justice that no-one should be a judge in their own cause, equally no-one should be able to choose their judge. It is crucial to justice that a judge be independent and impartial: that is the core value of the judicial oath to *do right to all manner of people after the laws and usages of New Zealand, without fear or favour, affection or ill will*.[7]

[18] Independent decision-making is also part of the foundation for rights of appeal to separate courts and different judges. Ms Tran's reference to seeking to review errors of law in the original decision appears to take no notice of the fact that she exercised her right of appeal and was heard by the High Court. The decision of that Court addressed her appeal in detail. Ms Tran then sought leave for a second appeal. While that application was declined, the decision of the Court of Appeal states that it reviewed the extensive material filed with it, could find no seriously arguable error of law raised in that material and concluded that there was no error of law in either the original decision of this Court or the decision on appeal of the High Court.

[19] The High Court and the Court of Appeal having considered whether there were errors of law in the original decision and found none, this Court cannot now address that and so I cannot look to see if any error is revealed.

[20] In terms of the effects on Ms Tran's business, two main points are apparent. First, the designation that was the subject of the original decision of this Court was amended to reduce its extent, including the extent of works under it which could affect her restaurant. Second, to the extent that the issue may relate to alleged business losses, those could not form part of this proceeding as this Court has no jurisdiction to address them. This point was confirmed by the Court of Appeal.

[21] No specific issue of fairness or justice is raised by Ms Tran. In the sense that those matters form the entire framework of what the Court must work within and on which its decisions are fundamentally based, I consider them as part of my overall evaluation.

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7 Section 18, Oaths and Declarations Act 1957.

I note that the Court of Appeal found that none of the matters raised by the Ms Tran before it suggested that there may have been a miscarriage of justice in the High Court in its review of the original decision of this Court.

Overall evaluation

[22] I have reviewed the matters raised by Ms Tran in her further application in order to make sure that, in an overall assessment of the fairness and justice of the case, I have not denied her access to justice on a substantive basis. I now observe that none of the matters raised by her could be said to come within the ambit of *new and important evidence … or … a change in circumstances that in either case might have affected the decision*, which are the only grounds on which a rehearing under s 294 of the RMA can be ordered. This is the same conclusion reached by Judge Newhook and Cr Hodges in the first decision on Ms Tran's application. There is therefore no jurisdiction to grant Ms Tran's application.

[23] I have dealt with this further application on the papers filed by Ms Tran and without hearing from any other party. I am satisfied that there would be nothing to be gained from putting further resources into Ms Tran's request. It follows that no issue of party and party costs can arise in relation to this decision.

[24] Notwithstanding that, I warn Ms Tran that continued applications and requests dealing with matters that have been finally determined after all rights of appeal have been exercised could lead to the Court considering making an order that she be restricted from continuing this proceeding or commencing any new proceeding in relation to the same matter on the ground that such proceedings are or would be totally without merit.[8]

[25] Noting that Ms Tran has represented herself throughout and acknowledging her right to do so, I urge her to seek legal advice before she takes any further step in relation to these matters.

D A Kirkpatrick
Environment Judge

[8] See sections 288C – 288F of the RMA and *Page v Whanganui District Council* [2018] NZEnvC 94.