

BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2020] NZEnvC 152

IN THE MATTER of the Resource Management Act 1991
AND of an appeal pursuant to s120 of the Act
BETWEEN GIBBSTON VINES LIMITED
(ENV-2018-CHC-008)
Appellant
AND QUEENSTOWN LAKES DISTRICT
COUNCIL
Respondent

Court: Environment Judge J J M Hassan
Sitting alone pursuant to s279 of the Act
Hearing: In Chambers at Christchurch
Date of Decision: 16 September 2020
Date of Issue: 16 September 2020

PROCEDURAL DECISION

- A: The application to adduce further evidence is declined.
- B: Costs are reserved. Any application must be filed within 10 working days, any reply within a further 5 working days, and any final reply within a further 5 working days.

REASONS



Introduction

[1] This proceeding concerns an appeal by Gibbston Vines Limited ('GVL') against a decision of Queenstown Lakes District Council ('QLDC') declining its subdivision and land use consent application. The application was for a seven lot residential subdivision and development of land¹ in the Gibbston Valley of the Queenstown Lakes District.

[2] On 2 July 2019, the court issued an interim decision² allowing GVL further opportunity to modify its proposal to address identified deficiencies, in particular related to reverse sensitivity effects.

[3] In a joint memorandum filed with the court, all parties agreed that the outstanding issues were as follows:³

- (a) Whether the proposed acoustic insulation condition appropriately addresses the effects of noise on the residents of the proposed dwellings;
- (b) Whether the revised proposal adequately addresses potential of the GVL proposal to render the deployment of frost fans and viticulture activities non-complying; and
- (c) Whether the non-object/APA covenant and consent notice mechanisms are appropriate to address long term reverse sensitivity issues.

[4] A submissions timetable was set. Concerns were subsequently raised by counsel for GVL⁴ around new factual and opinion material incorporated in and attached to the submissions filed by Brennan Wines.⁵ By way of Minute, I indicated to parties I considered the matters raised went beyond an "update" and indicated a formal application should be filed.⁶

[5] Brennan Wines has now filed an application to adduce further evidence. The application is opposed by GVL.⁷ QLDC and the other s274 parties are neutral in respect of this application.

¹ The site, as described in the consent application and QLDC's decision, is Lot 6 DP 400629 Computer Freehold Register 400984, and is at 2404 Gibbston Highway (SH6). The consent application is numbered RM170201 in QLDC's registry of consent applications.

² [2019] NZEnvC115.

³ Joint memorandum dated 8 June 2020 at [26(b)].

⁴ Memorandum of counsel for GVL dated 17 July 2020.

⁵ Section 274 parties Sean Brennan and Sharyn McWilliams are referred to collectively as Brennan Wines.

⁶ Minute dated 24 July 2020.

⁷ Notice of opposition for GVL dated 6 August 2020.



The application

[6] Brennan Wines' application seeks leave to adduce further evidence as follows:⁸

- (a) redacted versions of affidavit evidence of Mr J R Styles (a noise expert), Mr B Farrell (a planning expert) and Mr C S Brennan produced for a different proceeding, namely *Otago Viticulture and Oenology Limited v Queenstown Lakes District Council* CIV-2020-425-000035.⁹ That was a judicial review proceeding which was a challenge to the non-notified grant of consent RM200028 to Mt Rosa; and
- (b) a redacted email from Dr S Chiles (a noise expert) to a QLDC officer in the context of communications about a Brennan Wines Frost Fan resource consent application (RM200096).

[7] Brennan Wines notes that the court directed it to outline the facts and opinion it seeks to rely on. The relevant facts are as follows:¹⁰

- (a) The fact that Brennan Wines' reverse sensitivity concerns arising from new residential activities in proximity to the Brennan Vineyard extend beyond impacts on frost fans. [Confirmed in the Brennan affidavit.]
- (b) The fact that judicial review proceedings have been commenced challenging the grant of the Mt Rosa Consent, which includes a residential activity, on a non-notified basis. [Which appears to be accepted, but is reflected in/implicit in the judicial review affidavits.]
- (c) The fact that, if the Brennan Wines' judicial review proceeding is unsuccessful, the Mt Rosa consent and its residential activity would be eligible for consideration as part of the existing environment, and the effects of the Gibbston Vines proposal would be cumulative to the effects of that residential activity.
- (d) The fact that the Brennan Wines Frost Fan proposal is currently on hold, pending the progress of the judicial review proceedings, as it appears that it will not be favourably considered in light of the adverse expert opinion provided by Dr Chiles as to its effects on the proposed Mt Rosa residential unit.

[8] Brennan seeks to rely on opinions expressed in the noted documents, as follows:¹¹



⁸ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at A and B.
⁹ Otago Viticulture and Oenology Limited is the company that operates under the trading name of Brennan Wines.
¹⁰ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [3].
¹¹ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [4].

(a) an opinion by Dr Chiles that:

- i. frost fan sound above the 55 dBA LAeq (15 min) noise limit under Rule 36.5.8 is "likely to cause undue disturbance and would generally be considered unreasonable"; and that "the expected increase is likely to cause additional disturbance that would be unacceptable to most people"
- ii. "The adverse noise effects from the proposed frost fans under RM200096 identified above are not able to be adequately addressed through conditions as they are caused by inherent parts of the application such as the proposed frost fan types and locations".

(b) an opinion by Mr Styles in respect of:

- i. the interpretation and annotation of the T&T figures (so as to make the likely noise exposure easier to understand); and
- ii. the modelling and calibration undertaken to produce Exhibit A and B of Mr Styles' affidavit, which shows the noise levels likely to be received with and without the proposed new frost fans with greater clarity than in the T&T figures.

(c) an opinion by Mr Farrell as to related plan provisions in respect of:

- i. the Objective and Policies of the Gibbston Character Zone providing very strong direction that:
 - a. the Gibbston Character Zone is intended to enable viticulture activities; and
 - b. other activities, such as a residential unit, are not to "compromise", "adversely impact", or "impinge" on current and future viticulture activities.
- ii. the background to Rule 36.5.8, its purpose to protect people from frost fan noise, but that the Rule also: "... provides a basis for assessing a residential use that is proposed where it might be exposed to frost fan noise. This makes sense, ie if it is potentially inappropriate to locate a frost fan near a residential use in breach of Rule 36.5.8 then it follows that it would be equally inappropriate to locate a new residential use that would exceed that same noise limit."

[9] Mr Gardner-Hopkins, for Brennan Wines, submits that the noted documents and opinions are new evidence that arises entirely from factual circumstances that have occurred since previous evidence was exchanged. Specifically, he refers to the grant of consent to Mt Rosa's application (RM2000028), the judicial review challenge of the non-notified processing of that application, and the obtaining of expert opinion and the



lodgement and processing of the Brennan Frost Fan consent (RM2000096).

[10] Counsel acknowledges that aspects of this new evidence could have been obtained at the time of original evidence exchange. However, he explains that Brennan Wines was, at that time, relying on QLDC in respect of that evidence. He submits that, therefore, the evidence is “fresh”.¹²

[11] Mr Gardner-Hopkins says the evidence is both relevant, as it relates to reverse sensitivity effects and the impact of frost fans, and cogent, as it is given by affidavit or in the formal context of a consent application.¹³ Counsel acknowledges that the evidence has not been subject to cross-examination or questions before the court so may be given less weight. He explains that Brennan Wines did not wish to introduce additional delays. Hence, it approached the matter in this way in an attempt to “strike the appropriate balance”.¹⁴

[12] Counsel refers to the Planning Tribunal decision *Wood v Selwyn District Council*¹⁵ where the court exercised its discretion to grant an application to adduce further evidence. He submits that the circumstances here similarly justify that approach in that:¹⁶

- (i) The evidence would enhance the quality of the Environment Court’s decision-making process.
- (ii) The proceedings are public law proceedings, not just inter-party proceedings.
- (iii) The application is made not in an attempt to repair an omission in a party’s case, but because the evidence arose independently, but was considered relevant to these proceedings.
- (iv) Any prejudice can be avoided by allowing the Applicant an appropriate opportunity to respond to that evidence.

GVL’s notice of opposition

[13] GVL opposes Brennan Wines’ application on the grounds that it has not established that further evidence is relevant to the outstanding matters for the court’s determination. Ms Baker-Galloway on behalf of GVL addresses each of the agreed

¹² Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [5(c)].

¹³ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [5(d)-(e)].

¹⁴ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [5(i)-(j)].

¹⁵ *Wood v Selwyn District Council* (1994) 1B ELRNZ 94.

¹⁶ Notice on behalf of Brennan Wines to adduce further evidence dated 31 July 2020 at [5(f)].



outstanding issues as follows:

- (a) as to the acoustic insulation condition, counsel notes that GVL and QLDC's experts agree that a condition will be effective at protecting the internal amenity of dwellings, their only outstanding point of disagreement being whether the acoustic insulation condition should cover just bedrooms or living areas as well.¹⁷ Ms Baker-Galloway observes that Mr Styles' evidence related solely to specifics of level of noise exposure at distances from the proposed frost fans, appropriateness of the levels and effects on residents. The material sought to be adduced does not address the effectiveness of the proposed condition at protecting internal amenity. Accordingly, counsel submits it is not relevant to this outstanding issue.¹⁸
- (b) as to the second outstanding issue, the potential to render the frost fans non-complying, Ms Baker-Galloway says that GVL and QLDC experts agree that Brennan Wines' frost fan application will be non-complying even in the absence of the GVL proposal. Counsel acknowledges that the email from Mr Chiles is relevant to this point generally, but submits that "given that it concludes that the district plan noise limit will be breached within 400m of the proposed frost fans", it is consistent with the expert opinion already before the court. Ms Baker-Galloway observes that nor does Mr Styles offer a contrary view. Accordingly, counsel submits that the evidence cannot be said to be relevant to this issue either.¹⁹
- (c) thirdly, as to whether the proposed non-object/APA covenant and consent notice would be effective, Ms Baker-Galloway submits that the evidence does not address the third outstanding point in a material or probative way. She submits that this issue is, in any case, primarily a matter for legal submission, not evidence.²⁰

Discussion

[14] Section 276(1)(a) RMA provides that the court can "receive anything in evidence that it considers appropriate to receive". Further, pursuant to s278 RMA and rule 18.17 of the District Court Rules 2014, a party to an appeal may adduce further evidence with

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Notice of opposition for GVL dated 6 August 2020 at [4].

¹⁸

Notice of opposition for GVL dated 6 August 2020 at [5] and [6].

¹⁹

Notice of opposition for GVL dated 6 August 2020 at [11].

²⁰

Notice of opposition for GVL dated 6 August 2020 at [12].



the leave of the court.

[15] *Wood v Selwyn District Council* is a helpful exposition of considerations that can be relevant to the exercise of discretion as to whether to allow leave for evidence to be adduced late. I am also assisted by *Wynn-Parke v Auckland City Council*.²¹ In that case, the court noted the relevance of such factors. Ultimately, it declined leave for evidence to be adduced. That was particularly given the maxim that there be an end to litigation and its finding that there would be prejudice to other parties. The court also observed a need for caution that “the application [is] not... one brought simply to repair an omission in the party’s case”.

[16] I find the appropriate exercise of my discretion is to decline the application for a number of reasons. Brennan Wines had opportunity to call evidence in making its case at the substantive hearing but elected to rely on QLDC’s evidence. I find it would be unfairly prejudicial to the GVL to now allow opportunity for it to effectively repair and enhance its case. Furthermore, the opinion evidence from experts is not substantially helpful, and I find inadmissible, in that it is not in accordance with the Code of Conduct. Inherently, opinion evidence tendered for other proceedings (even by affidavit) cannot accord with the Code for the present proceeding. As for Dr Chiles’ email, it does not claim to have been offering opinion according to the Code, in any case. As such, the issue is not simply one of weight as Mr Gardiner-Hopkins has characterised it. I find the material inadmissible and, in any case, not probative as not being in accordance with the Code.

[17] Finally, the maxim of bringing finality to litigation applies here in a context where a substantive decision was issued several months ago and court-directed expert conferencing to facilitate finality in the determination of the appeal has concluded.

Outcome

[18] The application to adduce further evidence is declined and costs in respect of the application are reserved.

[19] It is directed that:



²¹

D & R Wynn-Parke v Auckland City Council [2010] NZEnvC 64 at [10].

- (a) Brennan Wines is to file and serve an amended set of submissions (removing reference to and reliance on the evidence subject to this decision) by **Monday 21 September 2020**; and
- (b) GVL is to file and serve any legal submissions in reply by **Monday 5 October 2020**.

[20] A telephone conference will then be set down to hear from the parties on whether the matter requires a hearing.



J J M Hassan
Environment Judge

