IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-1048

UNDER	the Declaratory Judgments Act 1908
IN THE MATTER OF	a declaration sought by the New Zealand Maori Council a duly incorporated body pursuant to s17 of the Maori Community Development Act 1962
	NEW ZEALAND MAORI COUNCIL Applicant

Hearing: 15 July 2009

Counsel: K Ertel for New Zealand Maori Council
B Arthur for Attorney-General
C Whata and K Elliot for Trustpower Limited and Rangitata Diversion Race Management Limited
J Knight and J Appleyard for Meridian Energy Limited

Judgment: 21 August 2009

JUDGMENT OF SIMON FRANCE J

Introduction

[1] The applicant, the New Zealand Maori Council, has filed an application for a declaration that:

> "Priority as between competing applications under the Resource Management Act 1991 for a finite resource should be determined through the exercise by consent authorities of a discretion."

[2] There is no existing particular resource consent application to which the declaration relates. It is "at large" in the sense that it is in reality a challenge to existing Court of Appeal authority. There is accordingly no named defendant.

[3] Notwithstanding the absence of a defendant, this judgment concerns an application by three "parties" to strike-out the proceeding:

a) the Attorney-General;

b) Trustpower Limited;

c) Meridian Energy.

[4] No jurisdictional point is taken by the New Zealand Maori Council over the capacity of these non-parties to seek a strike-out. It is necessary to commence by setting out the unusual history that has led to this situation.

Background

[5] The Resource Management Act 1991 is silent on how priority is to be allocated where more than one resource consent application is received concerning the same resource. The answer provided by the Courts has been "first in time", although which is first can itself be the subject of dispute.

[6] The authority for this rule is generally accepted to be the Court of Appeal decision in *Fleetwing Farms Limited* v *Marlborough District Council* [1997] 3 NZLR 257.

[7] Recently a dispute made its way to the Supreme Court. The parties disagreed over which resource application was first in time. The case was *Ngai Tahu Properties Limited* v *Central Water Plains* SC 15/2008. In the Court of Appeal the participants to the appeal had been just the named parties. The Canterbury Regional Council was the second respondent but abided the decision. In the Supreme Court both Trustpower and Meridian Energy had been given leave to intervene.

[8] There was an oral hearing of the appeal in the Supreme Court. Subsequent to that hearing, the Court issued an "Interim Judgment". It provided:

> [1] At the hearing of this appeal, all counsel took the position that priority as between competing applications under the Resource Management Act 1991 for a finite resource should be determined by a rule. Their submissions were directed to the question of what that rule should be. The Court now wishes to hear argument on the prior question of whether priority should be decided by a rule or through the exercise by consent authorities of a discretion and, if the latter, on what principles should the discretion be exercised.
>
> [2] The position of counsel that there should be a rule was consistent with the judgments of the Court of Appeal in *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257 and the High Court in *Geotherm Group Ltd v Waikato Regional Council* [2004] NZRMA 1, and of both those Courts in the present litigation. However these authorities are not binding on this Court.
>
> [3] To ensure that all the available arguments are before it, the Court proposes to appoint an amicus curiae.
>
> [4] The Registrar is directed to send a copy of this Interim Judgment to the Attorney-General, and to arrange a one day hearing as soon as possible. If sought, leave will be granted to the Attorney-General to intervene.

[9] As it happens both the Attorney-General, and the New Zealand Maori Council, successfully sought leave to intervene in order to be heard on the issue raised by the Court. However, before the scheduled further hearing could take place, the actual parties to the litigation settled their dispute and so the Supreme Court appeal was at an end.

The present application

[10] The Supreme Court was notified on 29 May 2009 that the appeal was abandoned. The New Zealand Maori Council filed the present application a few days later on 4 June. It sought directions as to service.

[11] The High Court declined to make directions. By agreement the parties to the Supreme Court hearing had been served with this application. Meridian, the Attorney-General and the Canterbury Regional Council appeared at the initial conference. Counsel for Meridian foreshadowed a strike-out application, and so Miller J deferred any service decision pending the hearing of such an application.

[12] By the time of the hearing before me, strike-out applications had been filed by both the Attorney-General and Trustpower. Meridian indicated it saw little profit in filing a third application on the same grounds, but gave notice it would appear to argue in support of the two already filed.

[13] At the outset of the hearing all participants accepted liability as to costs; none wished to take any jurisdictional points in relation to the capacity of the parties to make the applications made. Specifically the standing of the New Zealand Maori Council was accepted, and conversely the ability of the served non-parties to seek a strike-out was conceded. I do not address these matters further.

Purpose of application

[14] The New Zealand Maori Council recognises that the High Court will be bound by Court of Appeal authority. However the question is ultimately framed, this Court can only affirm the law to be that which has been set out in binding Court of Appeal cases.

[15] The aim is that, armed with this answer, the applicant will apply directly to the Supreme Court for leave both to appeal and to leap-frog the Court of Appeal. In that way the issue raised by the Supreme Court in its Interim Judgment can be returned to it for consideration.

Submissions favouring strike-out

[16] All three strike-out applicants base their primary opposition on two planks:

a) the absence of any underlying factual situation;

b) the inadequacy of, and dangers in, the questions as posed.

[17] Concerning the absence of any factual basis, the applicants emphasise that the Courts have traditionally been reluctant to engage in advisory opinions. The important functions of the facts in a particular case are to focus the argument and

decision, and also to provide limits on the precedent value. Each aspect is emphasised.

[18] In the particular case it is noted that the New Zealand Maori Council is not now or generally an applicant for resource consents. Giving it status to intervene in an existing dispute in relation to an actual consent application (as happened in the Supreme Court) is very different from allowing it to pose a general question wholly unrelated to a particular case (as is proposed here).

[19] In relation to the second concern, it is noted that the Supreme Court Interim Judgment requested input on what the content of any discretion might be. It is emphasised by the applicants that this aspect does not feature in the present declaration as presently framed. Nor is there any specific reference to the particular concerns of the New Zealand Maori Council. How is it said that its interests would be reflected if the rule were to become a discretion?

[20] The applicants also address the submissions of the New Zealand Maori Council, and challenge the applicability of the authorities relied upon. It is convenient to address those points in the context of discussing any relevant authorities. Likewise, the emphasis of the three applicants differed. No disrespect is intended by combining them into these two essential points.

Submissions against strike-out

[21] The position of the New Zealand Maori Council is that the Interim Judgment of the Supreme Court highlighted that it had concerns about an important area for Maori. The extent to which the first in time rule allows consideration of wider issues when determining priority is a matter of legitimate public interest, and is a matter of legitimate interest to Maori.

[22] The process chosen is the simplest means to get the matter back before the Supreme Court. The absence of a fact situation is not important. One can be assumed, and there are plenty of cases that illustrate the type of situations that arise.

The Declaratory Judgments Act 1908 does not specifically require there to be an actual dispute underlying an application.

[23] Concerning the adequacy of the question posed, and the need for further specifics, those matters can be addressed to the extent that the Court thinks necessary. They are not a reason why the proceedings should at this stage be struck-out.

[24] The Council rejects any suggestion that the application is an abuse of process. It is not simply seeking to say a Court of Appeal decision is wrong. Rather the point to be considered (namely a discretion rather than a rule) was not addressed in those cases, and was raised by the Supreme Court itself.

[25] Cases from which the New Zealand Maori Council draws support are *Gordon Smith* v *R* [2008] NZSC 56; *NZ Fish and Game* v *Commissioner of Crown Lands* HC WN CIV 2008-485-2020, 12 May 2009; *NZ Maori Council* v *Attorney-General* [1987] 1 NZLR 641; and *Greenpeace New Zealand Inc* v *Genesis Power Ltd* [2008] 1 NZLR 803 and [2009] 1 NZLR 730.

Jurisdiction to strike out?

[26] The applicants seek a declaration under what is a broadly worded statutory provision. It is well established that on hearing the application the Court has a wide discretion; the issue is how that might be applied at the strike-out stage.

[27] How the Court exercises its discretion in relation to the strike-out is pivotal to the progress of these proceedings. If a strike-out is declined, the application can be "heard" and the sought declaration refused. The New Zealand Maori Council will then be free to pursue its indicated appeal process. However, if the proceeding is struck-out, the process is either blocked or at least hindered. The latter option is noted because the strike-out would itself be appealable to the Court of Appeal.

[28] Rule 15 of the High Court Rules sets out the bases for strike-outs. The strike-out applicants identified two applicable grounds:

a) the proceedings disclose no reasonably arguable cause of action, defence or case appropriate to the nature of the pleading;

b) the proceeding is an abuse of process.

[29] In *Social Tonics Association* v *Manakau City Council* HC AK, CIV 2007-404-5613, 20 December 2007, Andrews J identified a test of "so untenable that no Court would exercise its discretion to make the declarations sought". Ronald Young J had applied a similar test in *Telecom New Zealand Limited* v *Commerce Commission* and *Telstra Clear Limited* HC WN, CIV 2004-485-2118, 6 October 2005.

Comparable cases?

[30] The general approach of courts to situations such as these is well settled. Having reviewed numerous situations where such cases have arisen, the authors of Zamir and Woolf *The Declaratory Judgment* (Sweet and Maxwell, 3rd ed, 2002, London) note (at 4.092):

> It can therefore be said that there is a substantial risk of the grant of a declaration being refused unless:
>
> (a) there is a dispute between the parties;
>
> (b) the dispute arises from specific facts which are already in existence;
>
> (c) the dispute is still alive; and
>
> (d) its determination will be of some practical consequence to the parties or the public.

[31] In the present situation none of these are met. The fourth point – the importance to the public – is potentially there if the Supreme Court were to hear the matter, but the expected answer in this Court will be of no import at all. Earlier in the text the authors identified four classifications of hypothetical issues that had come before the Courts (4.055):

> (a) where there is no dispute in existence;
>
> (b) where the dispute is divorced from the facts;

(c) where the dispute is based on hypothetical facts;

(d) where the dispute has ceased to be of procedural significance.

[32] Although the first of these options might embrace what is sought here, the cases therein discussed relate to situations where there was originally a dispute between parties that has now ended.

[33] It is also noted that the Courts have been increasingly willing to assist parties, particularly those exercising public functions, with clarification of their powers and obligations – *Ealing London Borough Council* v *Race Relations Board* [1972] AC 342, and *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

[34] Turning to the cases on which the New Zealand Maori Council rely, the first is *New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 641. This is the well-known consideration by the Court of Appeal of the then new State Owned Enterprises Act 1986. I do not consider it assists the applicant. It involved judicial review proceedings directed at preventing the relevant Minister from transferring Crown owned assets to the newly created State owned enterprises. There was a very specific focus, and a particular act or decision was targeted.

[35] The *New Zealand Fish and Game* case is a case that I recently heard. There the Fish and Game Council sought a declaration as to the effect of pastoral leases under which most of the South Island high country is held. In my view there is some merit in the proposition that the situations are similar. Fish and Game was not a party to the leases under consideration, and the lessor and lessee were in complete agreement as to the meaning of the lease. It was very much a case of a third party seeking a declaration on the meaning of someone else's contract. Three points can be made, however. First, the issue in that case seemed quite confined in that it concerned the interpretation of a specific document. The contradictors were the parties to the lease and both participated in the proceeding. Second, the issue of the appropriateness of making a declaration was never raised. Third, questions about the wisdom of the proceedings could be raised since it had a potential impact on the capacity in the future of unrepresented non-parties to advance claims to the land.

[36] The high water mark for the New Zealand Maori Council is perhaps *Greenpeace New Zealand Inc* v *Genesis Power Ltd*, in the Court of Appeal. Genesis proposed to build a gas-fuelled generating plant. Central to the assessment of its resource consent application would be how the decision-making authority applied s 104E of the Resource Management Act 1991 to the application. In a recent decision on an application by a different power generator, Mighty River Ltd, the High Court had ruled on the correct application of s 104E. An appeal from that decision was abandoned. Genesis wished to challenge the decision. It therefore filed an application in the High Court seeking a declaration as to the meaning of s 104E. Its proposed meaning was different from that which the High Court had adopted in its Mighty River decision. This application for a declaration was then transferred directly to the Court of Appeal without being heard by the High Court. The Court of Appeal agreed to hear the matter on this basis. As it happens, the matter was also the subject of a full appeal in the Supreme Court.

[37] There are obvious parallels to what happened there and what is proposed here. But there are also key differences. The Court of Appeal judgment (at paragraph [1]) records that the declaration related to a current existing resource consent application that had been made by Genesis. It appears that by the time of judgment there was renewed uncertainty as to whether the application would be pursued, but the case did have underlying it a specific consent application.

[38] The Court of Appeal's initial concern about the process was whether it should hear the matter separate from the actual resource consent process. It noted concerns that:

a) other parties may be involved in the consent process that were not represented before it;

b) the Court would not have the benefit of decision on the consent from the lower Courts;

c) the practical implications of the competing views as to the correct interpretation had not, at that point, been worked through.

[39] Notwithstanding these matters, the Court considered the jurisprudential risks were not substantial. The underlying issue was relatively defined, and the specific applications by Genesis and Mighty River were sufficient to "anchor the case in reality". Greenpeace's presence indicated a legitimate and competent contradictor was available. Finally to decline to hear it could provide major difficulties, and wasted costs, in relation to the consent application Genesis had filed. This was because, at the time of writing the judgment, the Court considered the earlier High Court decision to be wrong.

[40] Another case relied on was *Gordon-Smith* v *R* [2008] NZSC 56. There the Supreme Court heard argument on whether the Crown was permitted to vet jury lists. It was common ground that the outcome of the case would not affect Ms Gordon-Smith's position. While there are some parallels, I consider the reality of criminal procedure must be taken into account. Appeal grounds are limited, and errors in procedure might not necessarily amount to a miscarriage in a particular case. However, waiting for the right case might place at risk a large number of trials. Further, the control of the process is often in the hands of just the prosecution, subject to direction from the Court. The need for judgments to state principles wider than the particular case is a common feature of criminal procedure. That is much less the case here where the "parties" to a consent application are capable of determining for themselves the relevance of the issue to their facts.

[41] To these cases I add an example of a response reflecting the traditional approach: *Telecom New Zealand Limited* v *Commerce Commission* and *Telstra Clear Limited* HC WN, CIV 2004-485-2118, 6 October 2005. There, opposed applications for declarations as to the meaning of parts of the Telecommunications Act 2001 were struck-out. Ronald Young J observed:

> To return to the strike out principles I am satisfied that the plaintiff's causes of action are so clearly untenable that they cannot possibly succeed. I reach that conclusion acknowledging the wide and discretionary nature of the remedy sought and the rarity of such conclusions. I am satisfied, however, in summary that:
>
> (a) there is no justiciable issue before the Court;
>
> (b) the declarations sought are of "abstract questions distinct or distant from actual controversy";

(c) there are no acts or proposed acts upon which the Court could consider making a declaration;

(d) these proceedings inappropriately usurp a statutory process which provides an adequate remedy for the plaintiff's concerns;

(e) the declarations sought can legitimately be seen as an attempt to appeal from previously given decisions;

(f) declarations as to meaning of the phrases in question can only be done in a factual matrix which does not exist in these proceedings; and

(g) not all parties affected by the declarations sought are present in the proceedings nor indeed are they able to be readily identified.

Decision

[42] Two bases for strike-out are advanced. The challenge based on "abuse of process" asserts that the application is an abuse because it seeks to relitigate *Ngai Tahu Properties Limited* v *Central Water Plains* SC 15/2008. I do not regard that circumstance as amounting here to an abuse of process. The declaration seeks to relitigate the matter only as regards the applicable legal test, not the actual outcome. It is not a back-door method of changing the outcome in that case. In this context it is very similar to the *Genesis* v *Greenpeace* case, although the applicant lacks the immediate interest that Genesis had in overturning the law.

[43] The more solid ground is that the application falls squarely within the principle that it is clearly untenable. It avowedly mis-states the law as it has been known for ten years. It is so unarguable that at this point the applicant does not wish to argue its correctness, knowing that the Court in which it is brought is bound by precedent to reject it.

[44] The application also suffers from other deficiencies:

a) whilst the applicant has a broad interest in the topic, such that leave to intervene was granted by the Supreme Court, it is not itself a party seeking a resource consent now, or generally at all;

b) there is no factual situation attaching to it, nor any *lis* (live or settled). The application appears to be without precedent from a process viewpoint. It seeks to take a question of law to the highest Court totally divorced from any proceedings or relevant application, and would simply ask the Court to change a legal rule the applicant does not agree with;

c) the declaration as framed addresses only half the picture in that it would move the law from a rule to a discretion, but does not identify factors governing that discretion. It is one thing for a Court to identify such factors in the course of a decision on a case. It is rather more daunting to seek to modify the present declaration by setting out the criteria in an abstract but (necessarily) concisely stated way.

[45] The key issue, as I see it, is what role this Court should play. It is fair to observe that all the objections that can be made to what is proposed can be made at the hearing before the Supreme Court on applications made to that Court for leave to appeal and to by-pass the Court of Appeal. The Supreme Court can indicate its attitude to this process and that will define the boundaries for the future. All that is needed is for this Court to let it happen.

[46] On balance, I consider to do so would not be the correct approach. First, there is no suggestion from the Supreme Court that it is available to receive issues in such an unorthodox way. It would be reading a lot into an interim judgment issued by that Court within the context of an existing case.

[47] Second, there is no urgency. There is no pressing need to by-pass the normal routes by which the law is developed. Opportunities will arise for resource consent applicants, or interested parties, to assess whether the issue might be of relevance to a particular conflict surrounding a consent. If so the parties can raise it, or the Court can. The interim judgment of the Supreme Court is a matter of public record. Its existence will be known both to parties, and to the Court of Appeal as the body which has set out the existing rule.

[48] Finally the absence of any precedent for such a process tells against this Court facilitating it. Generally the answer to floodgates concerns can be "wait for the next one and we'll see", but here it would seem a legitimate factor to consider. What will be the determinant of a sufficient interest to bring such an application? That is not to diminish the standing of the New Zealand Maori Council, but one would need to be able to articulate a principled basis to separate the present applicant from many others potentially to be brought by a "concerned citizen", who might equally argue a genuine public interest in the correctness of the law. The hesitation of the Courts in embracing applications separated from actual disputes is well founded.

[49] For these reasons I consider the application to strike-out the proceeding should be granted. The proposed declaration is not capable of serious argument, and the underlying purpose of appeal to the Supreme Court does not overcome that deficiency.

[50] In support of these reasons I identify the following factors:

a) the lack of connection to any existing or past dispute;

b) the absence of any precedent for such a process, and the potential for opening the door to many such applications;

c) the absence of any indication from the Supreme Court that it contemplates hearing abstract questions brought before it in this manner;

d) the difficulty of satisfactorily articulating the proposed new rule of law (a discretion) in the form of a declaration.

[51] The proceeding is struck-out. The parties appearing on this application may file costs memoranda if agreement cannot be reached.

Simon France J

Solicitors:
K Ertel, Kathy Ertel & Co, PO Box 27042, Wellington, email: kle@klelaw.com
B Arthur, Crown Law Office, PO Box 2858, Wellington, email: bronwyn.arthur@crownlaw.govt.nz
C Whata, Russell McVeagh, PO Box 8, Auckland, email: christian.whata@russellmcveagh.com
J Knight, Chapman Tripp, PO Box 993, Wellington, email: john.knight@chapmantripp.com