IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-3310

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Resource Management Act 1991
BETWEEN	ENVIRONS HOLDINGS LIMITED Plaintiff
AND	THE ENVIRONMENT COURT AT AUCKLAND Defendant

Hearing: 4 June 2009

Counsel: J Mason and P Agius for Plaintiff
E Harrison for Environment Court and Winstone Aggregates Ltd (abide decision of the Court)
S Simons and C E Kirman for Crest Energy Kaipara Ltd
R M Bell for Northland Regional Council
C Irwin for Attorney-General

Judgment: 4 June 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:
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The application

[1] Environs Holdings Ltd seeks an interim order, in judicial review proceedings, to set aside a decision of the Environment Court. The Court declined to stay or adjourn a hearing due to begin on Monday next, 8 June 2009. The hearing is scheduled to last two weeks. It is an appeal against the grant of resource consents and recommendations in respect of restricted coastal activities.

[2] The application for relief is opposed by the applicant for the resource consent, Crest Energy Kaipara Ltd, and the Northland Regional Council, the consent authority.

Intervention by Attorney-General

[3] Mr Irwin, appears for the Attorney-General. This morning, I gave leave for the Attorney to intervene. I did so because issues of public policy arose in relation to principles of the Treaty of Waitangi and the Foreshore and Seabed Act 2004, which have not previously been the subject of a decision of this Court in the present context.

[4] I record my gratitude for Mr Irwin's assistance. In the end, I heard from him briefly on issues relating to the likely time that proceedings (to which I shall refer) in the High Court will take to determine and on aspects of the Foreshore and Seabed Act he considered relevant to the application.

Background

[5] Environs Holdings Ltd is an operating company controlled by the trustees of the Te Uri o Hau Settlement Trust. The Trust was settled to promote the general welfare of people living within the Te Uri o Hau rohe, who represent a Northland hapu of Ngati Whatua.

[6] The Trust has issued proceedings in this Court seeking a "finding" of territorial customary rights under s 33 of the Foreshore and Seabed Act. That proceeding is being managed by the Chief High Court Judge. The scope of the proceeding was outlined in a Minute issued by Randerson J, on 21 May 2009:

> [2] The applicant confirms that it wishes to proceed with its application for territorial customary rights on a staged basis. It intends to proceed first with the portion of the application limited to the area along the West coast of the rohe of the hapu, including the area subject to the Crest Energy Kaipara Ltd proceedings, being the area of foreshore and seabed from Karaka Point generally along the coastline following the northern reaches of the Kaipara Harbour. The applicant accepts that the Foreshore and Seabed Act 2004 limits the area of the application to the outer edge of the territorial sea but continues to assert that it has customary rights extending to the outer limit of the 200 nautical mile Exclusive Economic Zone.
>
> [3] The applicant intends to proceed with the remainder of the claim (relating to the East coast area) at a later stage.

[7] The Crest Energy proceedings, to which Randerson J refers, are those brought in the Environment Court to which the present application relates.

[8] Crest Energy sought a resource consent and recommendations in relation to restricted coastal activities to install and operate electricity generating turbines in the Kaipara Harbour. That application was granted, following a hearing before a Hearings Committee established by the Northland Regional Council, the relevant consent authority.

[9] A number of parties, including Environs, have appealed against that decision. Indeed, Crest Energy has also appealed against certain conditions imposed. The appeals have been set down for hearing over the next two weeks. Environs is concerned that the resource consent grants and the recommendations may prejudice the Trust's application for recognition of territorial customary rights. The consent relates to an area in the Kaipara Harbour, to which the High Court claim in part relates.

The procedural history in the Environment Court

[10] The appeals were set down for hearing as long ago as December 2008 when the Environment Court made procedural directions to ensure it was ready for hearing. At that time, though mooted, the territorial customary rights application had not been brought. That application was filed on 9 April 2009. On the same day, Environs applied for a stay or an adjournment of the appeal to the Environment Court. After a hearing by telephone on 21 April 2009, Judge Newhook dismissed the application, for reasons to follow. Reasons were given on 23 April 2009.

[11] In summary Judge Newhook's reasons for dismissing the application were:

a) First, contrary to counsel for Environs' submission, the nature and extent of any customary rights could be taken into account on appeal. For example, the Judge referred expressly to the right for Environs to lead evidence on "Te Uri o Hau's status as mana whenua, mana moana, tangata whenua, kaitiaki, ahi kaa and hau kainga" in relation to matters set out in Part II of the Resource Management Act 1991.

b) Second, proprietary rights could not be affected by any decision on the resource consent appeal. The Judge made the point that resource consents "are permissive in nature and take effect independently of ownership rights in relation to the land on which the activities are to be carried on".

c) Third, the process to determine customary rights was likely to be lengthy due, in particular, to their novelty and complexity. The appeals would be unduly delayed if adjourned to await the outcome of the proceedings in this Court.

d) Fourth, the consent holder, Crest Energy, was entitled to have appeals determined expeditiously. Judge Newhook referred to authority that

supported that proposition, including ss 95, 97, 101, 115 and 272(1) of the Resource Management Act.

e) Fifth, as a matter of discretion, the application to stay or adjourn was filed late. While the High Court proceedings had not been filed when the appeals were set down for hearing, the customary rights application was in the reasonable contemplation of the hapu at that time and was not mentioned as a reason not to fix a hearing date in December 2008.

Submissions

[12] Ms Mason, for Environs, submitted that the Environment Court Judge failed to take account of relevant considerations and, in doing so, reached a decision that no reasonable decision-maker could have made.

[13] Following discussion between Ms Mason and myself, during the course of argument, a series of succinct propositions were developed that Ms Mason accepted identified the circumstances that she submitted Judge Newhook failed to take into account.

[14] First, Ms Mason submitted that the Judge ought to have approached determination of the application for adjournment or stay on the basis that a consent authority or the Environment Court should not embark on a hearing of a resource consent application in respect of an area that is subject to an undetermined claim under s 33 of the Foreshore and Seabed Act, if, as in this case, the impact would be to allow a potential consent holder to occupy a significant part of the claimed area for a significant period of time. In this case, the length of the proposed consent is 35 years.

[15] Second, once a s 33 claim had been filed, the claimant should be treated as having "a very good arguable case" so that only a relatively small part of the area in issue could, in any event, be the subject of a resource consent.

[16] Third, the Judge failed to take account of the likelihood of prejudice to the claimants under the s 33 application. She submitted that such prejudice outweighed any prejudice to Crest Energy identified in the Environment Court Judge's decision.

[17] Fourth, Ms Mason submitted that the Judge failed to take into account adequately the relevant principles of the Treaty of Waitangi and the type of interest that could result from a s 33 "finding" that a territorial customary right exists.

[18] Counsel for Crest Energy Ltd and the Northland Regional Council opposed the application. I propose to summarise briefly the thrust of the main grounds of opposition, recognising that the summary does not do full justice to the submissions made by both Ms Simons, for Crest Energy, and Mr Bell, for the Northland Regional Council.

a) First, the decision under review was discretionary in nature. There was no reviewable error made by the Environment Court Judge.

b) Second, the additional circumstances that Ms Mason submitted ought to have been taken into account were in fact part of the Judge's reasoning process. Mr Bell, in particular, submitted that this Court must be mindful of the circumstances in which a decision to adjourn proceedings is made and avoid a temptation to infer that some factors were not taken into account, simply because they are not discussed extensively in the judgment.

c) Third, there is no reasonable likelihood that the s 33 claim could be determined within the period of nine months to one year, being the period for which Ms Mason contended the appeal should be adjourned. Further, it was unlikely that the collection of evidence in the High Court proceeding could greatly improve the quality of evidence available for the Environment Court to determine the appeal.

d) Fourth, prejudice of the type to which Judge Newhook referred added to wasted preparation costs incurred as a result of the delay between

> the time the adjournment application was refused on 21 April 2009 to the date on which the judicial review application was filed, 3 June 2009, militated against the grant of relief.

[19] Mr Bell pointed, in particular, to the nature of the appeal hearing scheduled to take place in Whangarei. He identified that there were 13 parties to the appeal including four appellants. In addition, there were persons who had given notice under s 274 of the Resource Management Act. 31 expert witnesses are expected to give evidence.

[20] The topics to be covered by the experts include engineering, coastal processes, effects on marine life, cultural and planning considerations. He emphasised that the hearing in the Environment Court is a fresh hearing of the original application for consents and is conducted on a judicial basis. Hence, it would be necessary for Crest Energy to make out its claim for a resource consent and appropriate recommendations before the Court.

Legal principles

[21] The application for interim relief is made under s 8 of the Judicature Amendment Act 1972. Section 8(1) provides that an interim order may be made if such an order is necessary in the interests of justice.

[22] In *Carlton and United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (HC and CA), observations were made about the nature of the discretion. Cooke P, at 430, was of opinion that there was a wide discretion available to the Court. All circumstances of the case could be considered including the apparent strength or weakness of the claim in issue. Ultimately, the Court must be satisfied that an order is necessary to preserve the position of an applicant for interim relief. Richardson J, at 430-431, took a similar view. He was of opinion that the circumstances in which the order could be made should not be circumscribed. Also, Somers J considered, at 433, that it was unnecessary to add any gloss to the word "necessary" or to attempt further definition. It was a matter of discretion for the

Court hearing the application to determine, on the circumstances before it, whether such an order was reasonably necessary.

[23] An important aspect of the present case is that while, in form, it is an application for interim relief, it is in reality an application to determine the issue finally. That is because within two working days the hearing in the Environment Court is scheduled to begin. Hence, my decision on the application today will determine finally whether that hearing can proceed or not.

Analysis

[24] Leaving to one side for the moment Ms Mason's submissions on the four propositions to which I have referred, I would have held that Judge Newhook's decision not to adjourn or stay the proceeding was unimpeachable. The issue is whether consideration of the additional factors makes any difference to that conclusion.

[25] With reference to the four propositions, I make the following comments.

[26] It is not appropriate to afford a status to a group seeking a territorial customary rights order that it does not possess. At present the seabed is vested in the Crown, by s 13 of the Foreshore and Seabed Act. The grant of a resource consent does not confer rights of proprietorship. It confers rights of use and occupation.

[27] The evidential requirements inherent in ss 33 and 34 of the Foreshore and Seabed Act mean that an outcome cannot be predicted with any confidence. Further, as Mr Irwin suggested, it is difficult to see the proceeding being resolved promptly and, even if it were and a finding made in favour of the claimants, there would still remain a period of negotiation with the Crown to determine what ultimate outcome resulted.

[28] In short, the claim may succeed or it may fail. That reality dictates that the existence of such a claim is simply a factor to be weighed in the balance on any adjournment application of this type.

[29] The hearing of the appeal could not, in any way, impact adversely on a decision in the s 33 proceedings but, on the other hand, deferral of the appeal would impact significantly on the rights of Crest Energy and appellants in that proceeding.

[30] Those observations dispose of the arguments advanced in relation to the first two propositions formulated as a result of my discussions with Ms Mason.

[31] I would also observe that Judge Newhook did take into account factors of this type. I refer to paras [10] and [11] of his judgment.

[32] The Judge did not overlook prejudice to Environs and/or the claimant group in the s 33 proceedings. While that factor was not expressly referred to in the judgment, it was necessarily implicit as part of the Judge's assessment of the relevance of the undermined territorial customary rights application. Put simply, the Judge considered that Environs concerns could be advanced at the appeal hearing, as part of the argument that the resource consents and recommendations ought not to have been made or granted.

[33] Ms Mason's final point went to an alleged failure to take adequate account of issues arising from ss 6(e) and 8 of the Resource Management Act. Those provisions state:

> **6 Matters of national importance**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
>
> …
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> ….
>
> **8 Treaty of Waitangi**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

[34] In particular, Ms Mason was critical of the Judge's failure to identify relevant principles of the Treaty in his decision. Further, Ms Mason suggested in argument that *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA) assisted her argument because in that case the Court overruled an earlier decision in *Re Ninety Mile Beach* [1963] NZLR 461 (CA) to hold that customary titles could exist in foreshore and seabed areas.

[35] However, that submission overlooks the fact that the Foreshore and Seabed Act was a legislative response to that decision which redefined the ownership of public foreshore and seabed and circumscribed strict procedures that had to be followed to establish entitlements, such as territorial customary rights. For that reason I do not regard the *Ngati Apa* decision as helpful to Ms Mason's argument.

[36] Indeed, I consider that Judge Newhook was correct to hold that all issues of the type to which ss 6(e) and 8 of the Resource Management Act refer could be raised on the appeal. The Environment Court can hear argument on whether the potential effects on any rights that the claimant group may establish after any "finding" under s 33 by the High Court and the fruits of any subsequent negotiation the Crown might enter into outweigh the grounds on which consents are sought.

[37] The other factor telling against relief is that this is a case in which the Minister of Conservation will need to approve the final proposal if resource consents are granted and recommendations made. That is because the recommendations relate to restricted coastal activities which must be approved by the Minister. It is accepted that the restricted activities are vital to the workability of the overall proposals. The addition of this factor adds a safeguard to the process from the group claimants' point of view. See, for example, *Whangamata Marina Society Incorporated v Attorney-General* [2007] 1 NZLR 252 (HC).

[38] It follows that I regard the balancing of factors to which Judge Newhook referred justified the refusal of the application to stay or adjourn. I find that the Judge did not fail to take account of any relevant considerations. His decision was one open to a reasonable decision-maker.

Result

[39] For those reasons, the application for interim relief is dismissed.

[40] As counsel for Environs had to leave Court before this decision was given this evening, I am not in a position to resolve questions of costs or the fate of the substantive judicial review proceeding.

[41] With the agreement of counsel, I express some views on each issue and leave it to counsel to explore these aspects further.

[42] Leave to apply is reserved, if any party wishes to seek costs. Any application of that type shall be referred to me when filed and I will convene a telephone conference to make appropriate timetabling directions. However, I hope that the following observations will assist the parties to reach an agreed resolution.

[43] So far as the fate of the substantive proceeding is concerned, it seems to me that the proceeding is spent. The appeal will proceed next week. There is nothing more that needs to be resolved. Subject to resolution of issues of costs, I consider that the application should be dismissed.

[44] On questions of costs, both Crest Energy and the Northland Regional Council have been put to considerable cost in meeting a late application to delay the hearing of the appeals for a significant period of time. As the application has failed it seems to me that there is no principled reason why costs should not be ordered in favour of both of those parties.

[45] My present inclination would be to order costs on a 2B basis, together with reasonable disbursements, with an uplift of 25% to recognise the urgency involved. Any disbursements would include reasonable travel and any accommodation expenses of counsel.

[46] So far as the Attorney-General is concerned, Mr Irwin indicates that the Attorney will meet his own costs, therefore, there will be no issue as to costs between the Attorney and other parties.

[47] I thank all counsel for their assistance at short notice today.

Addendum

[48] I direct the Registrar to list this proceeding before me for a case management telephone conference during the week of 13 July 2009. If all outstanding issues were resolved before then, a notice of discontinuance should be filed. The conference will be vacated and appearances excused should that occur.

P R Heath J