IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV-2017-442-000039
[2017] NZHC 1947

BETWEEN	BROOK VALLEY COMMUNITY GROUP INCORPORATED Plaintiff
AND	THE BROOK WAIMARAMA SANCTUARY TRUST First Respondent
	THE MINISTER FOR THE ENVIRONMENT Second Respondent
	NELSON CITY COUNCIL Third Respondent
	THE ROYAL FOREST AND BIRD PROTECTION SOCIETY INCORPORATED First Intervener
	TE WHARE O TE KAITIAKI NGAHERE INCORPORATED SOCIETY Second Intervener

Hearing: On the papers

Judgment: 15 August 2017

JUDGMENT OF CHURCHMAN J

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[1] Brook Valley Community Group Inc. (the applicant) have applied for interlocutory orders of a stay of the decision *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust*[1] (the High Court decision) and an interim relief order that the Brook Waimarama Sanctuary Trust (the first respondent) is not to

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1 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 1844.

proceed with the proposed aerial drop of brodifacoum poison baits until further order of the Court.

[2] This application follows the High Court decision dated 4 August 2017 in which the applicant did not succeed on any of its proposed grounds of judicial review. This decision was made urgently after the parties agreed to have the interim injunction and substantive proceedings heard in an urgent two day hearing on 26 and 27 July 2017. The purpose of this urgency was to preserve the position of the first respondent in the event of its success.

[3] At issue is the proposed aerial drop of 26.5 tonnes of brodifacoum poison baits in the form of Pestoff Rodent Bait 20R (Pestoff) on the Brook Waimarama Sanctuary land in accordance with the Resource Management (Exemption) Regulations 2017 and the *Code of Practice: Aerial and Hand Broadcast Application of Pestoff® Rodent Bait 20R for the Intended Eradication of Rodents from Specified Areas of New Zealand* (the 2006 Code). The applicant seeks to preserve its position by preventing the proposed drop until further order of the Court. The High Court decision sets out the facts behind this proceeding in detail, and I will not repeat them here.

Grounds

[4] The applicant seeks the following orders under r 20.10 of the High Court Rules 2016:

(a) a stay of the High Court decision; and

(b) an interim order preventing the proposed aerial drop from proceeding until further order of the Court.

[5] The grounds on which the applicant relies are as follows:[2]

(a) A Notice of Appeal has been lodged with the Court of Appeal against the High Court decision, which, if successful, will render the proposed aerial drop unlawful.

(b) The effects of the proposed aerial drop of brodifacoum will be significant and irreversible on the applicant, the community it represents, on native birds (through direct and secondary by-kill), on ecosystems and the environment.

(c) The first respondent has not complied with the *Operating Plan 63: Aerial and Hand Broadcast Application of Pestoff® Rodent Bait 20R (V9014) for the Intended Eradication of Rodents from Specified Areas of New Zealand* (Operating Plan 63) approved by the Ministry of Primary Industries on 27 July 2017.

(d) The first respondent has publicly advised of its intentions to proceed with the proposed aerial drop as soon as the weather is favourable.

(e) The interim order is necessary to preserve the position of the applicant.

(f) On further grounds set out in the affidavits of Susan Harris, Timothy David Mitchell, Tamika Lee Ann Simpson, Justine Dando McDonald, Cynthia Anna McConville, Dai Mitchell, James Edward Hilton, Peter John Visser, Dr Joanna Christine Pollard, Katharine Anne White and Christopher Ian St Johanser filed in support of the proceedings.

[6] Further submissions from the applicant included:

(a) The fear that the first respondent would proceed despite poor weather conditions. (I note that an operational decision as to whether the

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2 Application on notice for stay of proceedings of decision, 4 August 2017 at [A]-[G].

weather is appropriate for a bait drop is not a matter that can be judicially reviewed by the applicant).

(b) The proposed drop is not in accordance with Operating Plan 63 as it existed on 27 July 2017.

(c) The proposed aerial discharge is not in accordance with "compulsory criteria applied by the Department of Conservation for the use of brodifacoum on mainland New Zealand".[3] (In making this submission the applicant appears to have overlooked the fact that compliance with Department of Conservation policy is not required for private operators who are not operating on Department of Conservation land).

(d) Concern that s 181 of the Animal Welfare Act 1999 would not be complied with. (This submission is misconceived as s 181 exempts agricultural compounds and hazardous substances approved under the Agricultural Compounds and Veterinary Medicines Act 1997 and the Hazardous Substances and New Organisms Act 1996 from being covered by the Animal Welfare Act. Brodifacoum and sodium fluoroacetate are covered by this exemption).

(e) A repetition of the submissions made at the hearing on 26 and 27 July 2017, which the Court addressed in its judgment dated 4 August.

[7] The respondents each oppose the interlocutory applications for a stay and an interim order. The grounds relied upon are as follows:

(a) a substantial miscarriage of justice under r 17.29 of the High Court Rules is not likely to result if the judgment were enforced;

(b) the overall interests of justice favour declining to stay enforcement;

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[3] Memorandum of plaintiff in support of urgent ex parte (pickwick) application for stay of proceedings and grant of interim relief, 14 August 2017 at [5].

(c) the appeal will not be rendered nugatory by the lack of a stay. The majority of the appeal is concerned with matters at a national level and do not specifically relate to the first respondent;

(d) the applicant's appeal stands no reasonable prospects of success;

(e) the first respondent will suffer serious prejudice if the applicant is granted interim relief or a stay, given the time sensitive nature of the proposed drop. The hearing was specifically expedited so that the drop could proceed in August if the applicant was unsuccessful;

(f) the proposed brodifacoum drop is in accordance with Operating Plan 63 as amended on 11 August 2017;

(g) there are genuine concerns over the applicant's ability to pay an award of damages and costs should a stay be granted. The applicant has offered no undertaking as to damages to cover any prejudice to the first respondent in relation to the interim orders sought;

(h) the applicant has not paid security for costs on appeal as at 11 August 2017;

(i) the applicant is seeking to improve its position after the High Court decision by seeking interim relief which would render the High Court decision irrelevant; and

(j) the overall balance of convenience favours declining the interim relief sought or a stay pending the appeal.

The law

[8] The bringing of an appeal against the High Court decision does not operate to stay the effect of the High Court decision.[4] In the absence of an order by the Court, the successful party, here the first respondent, is entitled to enforce the judgment

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4 High Court Rules 2016, r 20.10(1).

given. A successful party is generally "entitled to enjoy the fruits of judgment in its favour".[5] The onus is on the applicant to persuade the Court that without a stay, the applicant's appeal rights are nugatory and requiring of interim protection.[6]

[9] Jurisdiction to apply for a stay of proceedings and interim orders comes under r 20.10 of the High Court Rules and r 12(3) of the Court of Appeal (Civil) Rules 2005. The Court will weigh a range of factors in determining on the whole case the balance between the successful litigants' right to the fruits of the judgment and the need to preserve the position of the appellant should the appeal succeed.[7]

[10] The Court of Appeal has endorsed the following non-comprehensive list of factors as relevant when balancing these competing interests:[8]

(a) If no stay is granted will the applicants' right of appeal be rendered nugatory?

(b) The bona fides of the applicants as to the prosecution of the appeal.

(c) Will the successful party be injuriously affected by the stay?

(d) The effect on third parties.

(e) The novelty and importance of the question involved.

(f) The public interest in the proceedings.

(g) The overall balance of convenience.

[11] This list is not an exhaustive one. Courts have also given consideration to the following factors:

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5 Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR20.10.01].

6 *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Company Co (NZ) Ltd* [1977] 2 NZLR 41 (CA).

7 *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

8 *New Zealand Insulators Ltd v ABB Ltd* (2006) 18 PRNZ 459 at [11] endorsing *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239, (1999) 13 PRNZ 48 (HC) at [9].

(a) the merits of the appeal;[9] and

(b) the fact an appeal may be rendered nugatory without a stay is not determinative.[10]

Analysis

Prejudice to the first respondent

[12] As a starting point, I note that the respondents are entitled to the fruits of the litigation, the outcome of which was permission to proceed with the proposed drop in accordance with the applicable legal framework. The purpose of the urgent hearing and decision on 4 August 2017 was so that the first respondent's ability to carry out the drop would be preserved should they succeed in the review. The attempt to now gain a stay of the substantive decision of 4 August 2017 undermines the purpose of holding an urgent hearing by further attempting to delay the proposed drop.

[13] The first respondent has invested a significant amount of money into the proposed drop to proceed as planned at the first favourable weather opportunity in August. Further delay will result in the drop being unable to proceed, at significant detriment to the first respondent who estimated the costs of delay as being at least $127,000.[11]

[14] The balance of convenience here favours the first respondent. The harm of not allowing the drop to proceed as planned will cause significant detriment to the respondent, and deny them the fruits of the litigation. The position at the present time as set out in the substantive High Court decision is that the drop is lawful, and can proceed despite the varied objections of the applicant. The effect of an interim order sought would be to render the substantive judgment of the High Court

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9 *Body Corporate No 188529 v North Shore City Council (No 6)* HC Auckland CIV-2004-404-3230, 11 February 2009.

10 *Keung v GBR Trustees Ltd* [2010] NZCA 396, (2010) NZAR 17 at [20].

11 Affidavit of Hudson Callahan Dodd, 3 July 2017 at [13].

irrelevant; this is a significant improvement of the applicant's position, not a preservation.[12]

[15] Further to this, there has been no undertaking as to damages from the applicant. The respondents each have submitted their serious doubts as to the applicant's ability to pay costs, and honour any undertakings. Without an undertaking from the applicant I agree that this furthers the risk of serious financial prejudice to the first respondent.

[16] Having read the Notice of Appeal of the applicant I do not perceive any of the grounds advanced as "seriously arguable".[13] This is not a determinative factor, and will ultimately be decided by the Court of Appeal, but adds to my conclusion that in the interim the balance of convenience favours the respondents.

Will the right of appeal be rendered nugatory?

[17] In refusing to grant the stay and the interim orders, I do not believe the applicant's right of appeal is rendered nugatory. The Notice of Appeal challenged the overall validity and legality of the Resource Management (Exemption) Regulations 2017 and the interpretation of key sections of the Resource Management Act 1991. The Court of Appeal in its determination can provide substantive relief to the applicant should it agree with the applicant's interpretation, and this will impact all future proposed drops which the applicant challenges, both of brodifacoum and sodium fluoroacetate. The right of appeal and the relief sought will have value to the applicant, even if the current proposed drop proceeds as planned.

[18] Even if the applicant's appeal was rendered nugatory by the proposed drop proceeding as planned, I consider this factor alone is insufficient and not determinative against those I have discussed above.

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12 *Squid Fishery Management Company v Minister of Fisheries* (2004) 17 PRNZ 97 (HC) at [29].
13 *Salem Ltd v Top End Homes Ltd* (2005) 18 PRNZ 122 at [5].

Effects of the drop on the applicant

[19] The applicant in its submissions for interlocutory orders repeated its claims about the harmful and irreversible impacts upon its members and the wider Nelson community. The Court was not persuaded in its substantive decision by the submissions of the applicant, and I am unconvinced that these factors were:

(a) based on anything more than opinion or ill-informed fear; or

(b) scientifically rigorous; or

(c) of greater substance than the expert opinions of the Nelson City Council assessors and the scientific evidence of the Ministry of Primary Industries, Department of Conservation, and Ministry for the Environment in holding that the effects of the proposed drop will be no more than minor, and in proportion to the purpose of the activity.

Compliance with the new Operating Plan 63

[20] The applicant has raised the issue of compliance with the new Operating Plan 63, approved by the Minister for Primary Industries on 27 July 2017. This Operating Plan was further amended on 11 August 2017 by the Minister to clarify that proposed aerial drops of Pestoff 20R which conform with the 2006 Code and which were planned prior to 27 July 2017 were permitted to continue until completion for the 2017 season, and that Operating Plan 63 would apply to future applications brought after 27 July 2017. This had been my understanding, that the first respondent could proceed with the drop in accordance with the law as it was at the time the drop was planned. A change in the Operating Plan does not retrospectively invalidate drops made in accordance with the previous 2006 Code.

Further claims

[21] I agree with the submissions for the second respondent that the new claims raised by the applicant, relating to exemptions under the Wildlife Act 1953 and Animal Welfare Act 1999 and other matters were not before the High Court and cannot be relied upon to justify the grant of a stay or interim orders.

[22] A further affidavit of Christopher Ian St Johanser, chairperson of the applicant, was tendered in evidence by the applicant.[14] This affidavit contained evidence as to the interpretation and effect of s 13 of the RMA and r FWr9 of the Nelson Resource Management Plan. As Mr St Johanser is neither a legal expert or a planning expert, I give this opinion no weight in my assessment. Mr St Johanser also gave his opinion as to the amount of poison to be used in the proposed drop as "overkill".[15] As Mr St Johanser is not an expert, so far as I can ascertain, in the use of vertebrate toxic agents or pest eradication I have disregarded this opinion. Mr St Johanser repeated the concerns of the members of the plaintiff as to the "irreversible" effects of the poison on the community and environment. These concerns have been heard, both in the Court's substantive decision and in this interlocutory application. They do not override the lawfulness of correctly promulgated regulations, and the wider scientific consensus as to the effects of brodifacoum on the environment.

Conclusion

[23] For the reasons set out above, there are insufficient grounds to grant the interlocutory orders sought by the applicant. To do so would deny the respondents the fruits of the litigation and would cause irreparable harm to the first respondent's interests. The applicant's position in the appeal will not be rendered nugatory by the refusal to grant a stay.

Costs

[24] I formally reserve leave for the respondents to apply for costs in respect of this application, should they wish to do so.

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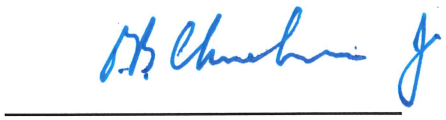
14 Affidavit of Christopher Ian St Johanser, 10 August 2017.
15 At [8].



Churchman J

Solicitors:
Susan Grey, Nelson for Plaintiff
Duncan Cotterill, Nelson for First Respondent
Crown Law Office, Wellington for Second Respondent
F McLeod, Solicitor, Nelson City Council for Third Respondent
P Anderson, Solicitor, The Royal Forest and Bird Protection Society Incorporated, Christchurch for First Intervener
Menzies Marshal, Winton for Second Intervener