IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-2723
[2013] NZHC 287

UNDER	Part 30 (formerly Part 7) of the High Court Rules
IN THE MATTER OF	the Electricity Act 1992 and of the Resource Management Act 1991
BETWEEN	KAPITI COAST DISTRICT COUNCIL
AND	TRANSPOWER NEW ZEALAND LIMITED Applicants
AND	KAPITI HIGH VOLTAGE COALITION INCORPORATED Respondent

Hearing: 20 February 2003

Counsel: J A Knight and N S Wood for Applicant (Transpower)
G S Taylor for Respondent

Judgment: 21 February 2013

In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 2.00pm on the 21st February 2013.

JUDGMENT (NO. 2) OF WILLIAMS J
(STAY APPLICATION)

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[1] I issued a substantive judgment on this matter on 23 November 2012. After issuing a number of declarations, I ordered that by 23 February 2013 Transpower must make application for such RMA permissions or consents as would render the Waikanae and southern reconductoring projects compliant.

[2] Kapiti High Voltage Coalition appealed my judgment challenging:

(a) my finding that the 2009 regulations applied in principle to the lines; and

(b) my existing use rights findings in respect of the southern section.

[3] Transpower then cross-appealed, challenging both my declaration quashing the 1998 and 2000 certificate of compliance decisions in relation to the Waikanae lines, and the three month timeline for the filing fresh RMA applications.

[4] Transpower argues that a stay of the three month requirement pending hearing of the appeal in the Court of Appeal is a practical way of ensuring that Transpower is not put to the cost of making applications in respect of the Waikanae reconductoring where, if the cross-appeal is upheld, such applications will have been found to be unnecessary.

[5] Mr Taylor argues first that the three month order is so closely tied to the declarations declaring the relevant certificates of compliance and consents invalid from the beginning, that it is not possible to separate them. The effect he says, is that the declarations once made cannot be, by this side wind, retrieved. Mr Taylor called in aid a UK Supreme Court decision in *Ahmed v H M Treasury*[1] in which a majority of that court refused to suspend declarations quashing various anti-terrorism orders.

[6] Mr Taylor's second argument is that even if the 2009 regulations override the District Plan where there is conflict, it is arguable that the height restriction in the District Plan (12 metres in both the operative and newly notified proposed plans) are not subject to control under the regulations. This is because the regulations do not

[1] *Ahmed v H M Treasury* [2010] 4 All ER 829.

set an absolute pole height, but provide only for a maximum 15 per cent increase on the status quo. This means, Mr Taylor says, that all poles over 12 metres (and that is most of them in the southern reconductoring) require a resource consent pursuant to the operative and proposed plans notwithstanding the 2009 regulations. Thus, whether or not the regulations apply, applications are required.

[7] Mr Taylor's third argument was that even if a stay is appropriate, the terms of the stay would need to take proper account of the progress of the newly notified Proposed District Plan as, the rules in that plan are very likely to affect the nature and extent of any consent application required – again with or without the 2009 regulations.

[8] I am satisfied that a stay of the three month order pending disposal of the appeal is appropriate in these circumstances. It is true, as Mr Taylor argues, that the application was filed relatively late (18 February 2013) but there is no doubt that the cross-appeal is both arguable and bona fide. In addition, Mr Knight has rightly pointed to the practical dilemma that Transpower must confront. If successful in the cross-appeal, Transpower will have filed an application in the Waikanae reconductoring that was unnecessary. And if KHVC is successful in its appeal, the consents required in the southern reconductoring will be far wider in ambit than my judgment would require.

[9] It is not for me now to engage in yet another lengthy analysis of the relationship between the District Plan and the regulations in order to determine whether there is a lacuna in the regulations that is filled by the absolute height controls in the District Plan. That matter would require careful submissions, and perhaps even evidence, for which there was not time yesterday. It is far preferable to leave that issue to be resolved either in the Court of Appeal or in the Environment Court whether through the resource consent process, application for declarations or enforcement proceedings. In any event, the argument does not meet the point that the nature of the consents required may be fundamentally affected by the outcome of the appeal, even if Mr Taylor is right on the height argument.

[10] Even if the declaration and three month direction were not severable, I do not read *Ahmed* as finding that the court has no power to suspend the effect of a declaration as to current legality. The concern of the majority related to the possible impression that suspension would give about validity in such an important and controversial case, not about whether suspension was possible at all. A key aspect of that case was that the UK Supreme Court was the end of the road for the litigants, at least the judicial road.[2] In fact declarations had been made and suspensions granted to facilitate appeals at both first instance and in the Court of Appeal.[3] It was the finality of the Supreme Court judgment that made suspension inappropriate. That is not an issue here.

[11] In any event, reference should also be made to the celebrated New Zealand decision in *Fitzgerald v Muldoon*[4] in which Wild CJ declared the then Prime Minister's proclamation in relation to superannuation payments to be unlawful. There the Chief Justice suspended the effect of the declaration for six months, to allow Parliament to consider proposed legislation resolving the matter.

[12] In this case, as in *Ahmed* in the lower courts, a stay is justified for the practical purpose of facilitating appeals and avoiding unnecessary cost and effort in compliance in the meantime. And it is to be remembered that the application relates only to the three month direction, not the declaration. In my view, the two are clearly severable anyway.

[13] There will be a stay accordingly in respect of the order at [299] of the substantive judgment pending determination of the appeal and cross-appeal filed in the Court of Appeal on this matter.

[14] Given Transpower's delay in making this application, there will be no order for costs.

Williams J

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2 The suspension was sought to allow the UK Parliament time to consider validating legislation.
3 See [16] per Lord Hope.
4 *Fitzgerald v Muldoon* [1976] 2 NZLR 615.