IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2017-442-68
[2018] NZHC 2166

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of a decision made under section 125(1A)(b) Resource Management Act 1991
BETWEEN	NGĀTI TAMA KI TE WAIPOUNAMU TRUST Applicant
AND	TASMAN DISTRICT COUNCIL First Respondent
	KAHURANGI VIRGIN WATERS LIMITED Second Respondent

Hearing: 3 August 2018

Appearances: T Hovell and R Ashton for the Applicant
C Thomsen and J Maslin-Caradus for the First Respondent

Judgment: 22 August 2018

JUDGMENT OF COOKE J

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[1] The first respondent, the Tasman District Council (the Council) applies to strike out the judicial review proceedings brought by the applicant, Ngāti Tama ki Te Waipounamu Trust (Ngāti Tama). The second respondent is taking no active involvement in these proceedings and counsel have been given leave to withdraw.

Background

[2] Beneath the Tākaka Valley in the Tasman District lies a large subterranean geological formation of kaarst limestone. Over millions of years the limestone has partly dissolved leading to a network of caves and rivers where the water makes its way underground for considerable distances. When the water travels through the network it becomes filtered by the limestone so that when it re-emerges it has remarkable clarity. Counsel described the subterranean network as spectacular, and the filtered water as some of the purest in the world. Precisely where all the water resurfaces after travelling through the network is not fully known, but one of the places it does so is the Te Waikoropupū Springs.

[3] On 22 February 2005, the second respondent, Kahurangi Virgin Waters Ltd (KVW), was granted a water take consent authorising the taking of ground water from the network at the Tākaka Gravel Aquifer, bore WWD 6011, Golden Bay. KVW is a Māori/Pākehā joint venture limited liability company. Two iwi with a special interest in Golden Bay and Te Waikoropupū Springs, Ngāti Rārua and Te Ātiawa, are shareholders.

[4] Ngāti Tama is a trust formed in April 2013 for the purposes of promoting the spiritual and cultural advancement of the Ngāti Tama ki Te Tau Ihu iwi (the iwi), and the maintenance and establishment of places of cultural and spiritual significance to the iwi. It is also the Mandated Iwi Organisation for the iwi. The iwi also has a special relationship with the Te Waikoropupū Springs. At the time the resource consent was granted it was anticipated that the iwi would also be part of the joint venture. At that time a written approval dated 21 January 2005 was provided from a body representing the three iwi, the Tangata Whenua Iwi Trust (Manawhenua ki Mohua). It was signed by a representative of each iwi, including the chairperson of the trust representing Ngāti Tama ki Te Tau Ihu at the time. As a result of this consent the original

application did not assess cultural or spiritual effects of the consented activities. The resource consent was processed on a non-notified basis, and was granted with a 2019 expiry date, but on condition it was required to be implemented by February 2010 otherwise it would lapse.

[5] On 27 July 2009 KVW applied for an extension of the lapse date, and on 11 August 2009 this was granted to extend the date to 22 February 2013.

[6] In the meantime, the position of the iwi changed. It provided evidence suggesting that the original body representing all three iwi made decisions on a majority basis, and that it operated with little input from the iwi trusts or iwi members. Ngāti Tama says that the extent of the iwi's interests have now been more fully recognised in the Treaty settlement process, and particularly in the terms of the settlement set out in the Ngāti Kōata, Ngāti Rārua, Ngāti Tama ki Te Tau Ihu, and Te Ātiawa o Te Waka-a-Māui Claims Settlement Act 2014 (the Settlement Act). The Settlement Act includes statements of association that the iwi have with the Tākaka river catchment. The Crown has also in the settlement acknowledged iwi values in other sites including the Te Waikoropupū Springs, which are described as a precious taonga. The Te Waikoropupū Springs are also identified in the settlement in terms of protection principles subject to agreement with the Minister of Conservation, which had been reflected in a Gazette notice dated 21 August 2014.

[7] It was against this changed context that KVW applied on 11 February 2013 for a second three-year extension to the lapse date. Prior to the application being made, on 10 December 2012, Ngāti Tama's predecessor wrote registering its objection to such an extension as it now opposed the activities covered by the resource consent. Notably in the extension application itself KVW identified that the involvement and collaboration of all three iwi was "both highly desirable and indeed necessary in the KVW water project". The Council nevertheless granted the further extension on conditions, but it said that yet a further extension was unlikely to be approved.

[8] On 18 December 2015, KVW applied for yet a further extension. KVW also applied for a variation to the resource consent. On 20 January 2016, Ngāti Tama again wrote indicating that it opposed. On 22 February 2016, the Council decided to grant

the third extension, extending the new lapse date to 31 May 2018. The variation decision was put on hold.

[9] Such extensions to the lapse dates are granted under s 125 of the Resource Management Act 1991 (the RMA) which provides:

> **125 Lapsing of consents**
>
> (1) A resource consent lapses on the date specified in the consent or, if no date is specified,—
>
> (a) 5 years after the date of commencement of the consent, if the consent does not authorise aquaculture activities to be undertaken in the coastal marine area; or
>
> (b) 3 years after the date of commencement if the consent does authorise aquaculture activities to be undertaken in the coastal marine area.
>
> (1A) However, a consent does not lapse under subsection (1) if, before the consent lapses,—
>
> (a) the consent is given effect to; or
>
> (b) an application is made to the consent authority to extend the period after which the consent lapses, and the consent authority decides to grant an extension after taking into account—
>
> (i) whether substantial progress or effort has been, and continues to be, made towards giving effect to the consent; and
>
> (ii) whether the applicant has obtained approval from persons who may be adversely affected by the granting of an extension; and
>
> (iii) the effect of the extension on the policies and objectives of any plan or proposed plan.

[10] Ngāti Tama then challenged the extension decision by way of judicial review. In *Ngāti Tama ki Te Waipounamu Trust v Tasman District Council*, Thomas J upheld the judicial review challenge.[1] Firstly, she held that the Council had erred in law in applying s 125(1A)(b)(i) because it had failed to properly consider whether or not substantial progress or effort had been and continued to be made towards giving effect to the consent, which was a material error. Secondly, she held that a factual error as

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1 *Ngāti Tama ki Te Waipounamu Trust v Tasman District Council* [2017] NZHC 1081.

to whether there was a physical connection between the point of take and the Te Waikoropupū Springs meant that Ngāti Tama's position as a potentially affected party was not correctly analysed under s 125(1A)(b)(ii). Finally, she held that the changed context surrounding the Treaty settlement was of relevance to the planning situation, which could also be properly considered under s 125(1A)(b)(iii), although she dismissed the pleaded challenge under that subsection.

[11] On reconsideration, the Council again granted the extension. The present proceeding is a challenge to the reconsideration decision. Since this decision was made the relevant resource consent has lapsed as it was not implemented by the time of the reconsidered lapse date.

Summary of parties' arguments

[12] The Council says that the present challenge to the reconsideration decision is now moot, has no utility and ought to be struck out. In doing so it relied on the decision of the Court of Appeal in *Te Whakakitenga O Waikato Inc v Martin*, where it was held that the Court could strike out judicial review proceedings when they had no utility.[2] Mr Thomsen and Ms Maslin-Caradus argued that the relief sought by Ngāti Tama as pleaded in the amended statement of claim was now futile as the resource consent had lapsed.

[13] Mr Thomsen and Ms Maslin-Caradus also argued that there was no exceptional precedent value arising from the case, and they contrasted it to the precedent value involved in the judgment of the Supreme Court in *R v Gordon-Smith*.[3] They said that the issues in the present proceeding were highly fact specific and any decision would not have general application. They also said that the costs of the proceeding could be dealt with in the usual way. They extended upon these key submissions in further written submissions provided at the hearing, and in exchanges during the oral hearing.

[14] Ngāti Tama contended that the proceeding should continue for the purpose of declaratory relief as it had utility for Ngāti Tama, territorial authorities and other

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2 *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173.
3 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721.

interested parties involved in decisions on applications to extend the lapse dates of resource consents. Mr Hovell argued that the matters raised in the amended statement of claim related to broader principles that are highly likely to arise in the future. He said that the precise formal declarations sought could be addressed at a later point, or alternatively that leave should be granted to formulate declarations if the Court thought that was necessary. Reliance was placed on a number of the principles that are applicable to strike out applications, including that the procedure should be used sparingly.

[15] Mr Hovell particularly relied on the judgment of Thomas J in *New Zealand Maori Council v Attorney-General*[4] and the decision of this Court in *Reuters Homes Ltd v Wanganui District Council*,[5] where the Court gave declaratory relief in a judicial review challenge to RMA decisions because of their precedent value. Mr Hovell distinguished the decision of the Court of Appeal in *Te Whakakitenga O Waikato*, which did not relate to statutory powers of decision, but a claim for breach of natural justice. Further he argued that the proceeding should continue, at the very least, to resolve the question of who was liable for the costs of the proceeding to date.

Judicial review procedure: strike out

[16] There is no dispute that a judicial review proceeding can be struck out under r 15.1 of the High Court Rules 2016. That was confirmed by the Court of Appeal in *Te Whakakitenga O Waikato*, where the Court said:[6]

> *Approach to strike out*
>
> [15] A court may strike out a claim if it discloses no reasonably arguable cause of action. It is inappropriate to strike out a claim unless "the court can be certain that it cannot succeed". The jurisdiction should be exercised sparingly. However, as this Court said in *Attorney-General v McVeagh*:
>
> > "… if the claim is doomed to failure, there can be no justification for allowing it to continue. The striking-out jurisdiction is founded on the realisation that resources are finite and are not to be wasted."
>
> [16] The same principles apply to striking out an application for judicial review.

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4 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 186.

5 *Reuters Homes Ltd v Wanganui District Council* (2011) 16 ELRNZ 493, [2011] NZRMA 357 (HC).

6 *Te Whakakitenga O Waikato*, above n 2, at [15]–[16] (footnotes omitted).

[17] There is one possible adjustment to the appropriate approach arising from the subsequent enactment of the Judicial Review Procedure Act 2016, however. Whilst the replacement of the Judicature Amendment Act 1972 with the Judicial Review Procedure Act was not intended to make substantive changes to judicial review procedure, there is one clarification that may have been introduced by the new Act. Under s 9(7) of the Judicature Amendment Act 1972, an application for judicial review was to be "in accordance with rules of Court", which was sometimes taken to be a reference to the High Court Rules in totality. Under the Judicial Review Procedure Act, it may be that not all High Court Rules have automatic application. The Judicial Review Procedure Act appears to say more clearly which rules apply. In particular, s 8(2) of the Judicial Review Procedure Act applies Part 5 of the High Court Rules in relation to the commencement and filing of an application for judicial review, and s 10(3) provides Part 5 applies to the filing of a defence. There is no equivalent of s 9(7) of the Judicature Amendment Act to brings in all the other rules. Questions of procedure are regulated by the case management conference contemplated by s 13, which encompasses the orders that the Court can make under s 14(1). This includes:

> …
>
> (2) The orders and directions referred to in subsection (1) are orders and directions to—
>
> …
>
> (k) exercise any powers of direction or appointment vested in the court or a Judge by the High Court Rules in respect of originating applications:
>
> …
>
> (m) give any consequential directions that the Judge considers necessary.

[18] Whilst it is not clear that this was a deliberate change,[7] the authors of *McGechan on Procedure* have noted it, stating that the provisions of the Act would be expected to prevail over the High Court Rules if there was a conflict.[8] This

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7 See Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at [2.34] and [2.35].

8 *McGechan on Procedure* (online ed, Thomson Reuters) at [JR8.01].

interpretation means that the relevant High Court Rules may apply, but subject to the Court's control under ss 13 and 14.

[19] This approach seems to me to be the preferable one. It is consistent with the general approach to judicial review procedure, and with the view expressed in earlier Court of Appeal decisions that the former s 10 (now ss 13 and 14) was to some extent intended to be a procedural code for judicial review.[9] It allows judicial review proceeding to be managed in the appropriate way given what the case involves. The control is important to achieving the "simple, untechnical and prompt" approach to review.[10] It may be the case that the pursuit of an application to strike out a proceeding will not achieve those objectives, as it will simply add a layer of complexity to a proceeding. Judicial review is usually determined on affidavit material, and a strike out application does not ultimately save the cost and expense of a trial involving viva voce evidence. So it may be better to proceed straight to the substantive hearing. But there will nevertheless be cases where such an application may be appropriate. The present case may be an example. The key point is that the better view may be that no party has the ability to apply to strike out a judicial review proceeding as of right. It is ultimately subject to judicial control under ss 13 and 14.

[20] In the present case, there may also have been another way forward in procedural terms. In *Association of Dispensing Opticians of New Zealand Inc v The Opticians Board*, the Court of Appeal dealt with a situation where there was a counterclaim in a judicial review proceeding that sought declaratory orders.[11] An issue arose as to rights of appeal to the Court of Appeal, and the Court indicated that the powers in the equivalent of s 14 could have been used to more efficiently deal with the issues in that case. Richardson P held:

> [18] Section 10 of the Judicature Amendment Act 1972 also provides specific case management powers. A Judge may direct the holding of a judicial conference and give a wide range of directions for the purpose of ensuring that the application and the matters in dispute may be determined conveniently, effectively and expeditiously, including fixing a time by which affidavits or

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9 See, for example, *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353 and *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 656–658.

10 See *Attorney-General v Dotcom* [2013] NZCA 43, [2013] 2 NZLR 213 at [39].

11 *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA).

> documents shall be filed (s 10(2)(f)), requiring the discovery of documents (s 10(2)(i)), fixing the time for hearing (s 10(2)(g)) and giving such consequential directions as may be necessary (s 10(2)(l)).
>
> …
>
> [20] Similar considerations apply to the hearing of this counterclaim which is so closely linked to the application for judicial review and where the procedure is designed to provide a convenient and speedy determination of questions as to the construction of statutory provisions under which the impugned decisions were made by the Opticians Board. And instead of counterclaiming for a declaration the Opticians Board could have asked the High Court pursuant to s 10(2)(k) of the 1972 Act to exercise the power under the rules to direct that the construction questions be the first issue for determination in the judicial review proceedings.

[21] Section 14 of the Judicial Review Procedure Act is in equivalent terms, and the former s 10(2)(k) correspondents to s 14(2)(k). For similar reasons, the Council here could have asked the Court to direct, as a preliminary question, whether in light of developments and the fact that executory orders can no longer be sought, that it was not an appropriate case to continue for declaratory purposes only and that the judicial review proceedings should be dismissed.

[22] One of the advantages of proceeding in this way is that it would have avoided complications associated with technical points that may have reduced relevance in this context. For example, Mr Hovell raised the following issues as matters of opposition to the strike out application.

> The following case law principles apply to an argument that a case discloses "no reasonably arguable cause of action"[12]
>
> (a) Pleaded facts, whether or not admitted, are assumed to be true.
>
> (b) The cause of action or defence must be clearly untenable. In *Couch v Attorney-General* Elias CJ and Anderson J, at [33], said: "*It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed*."
>
> (c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.
>
> (d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.

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[12] *Attorney-General v Prince* [1998] l NZLR 262, (1997) 16 FRNZ 258, [1998] NZFLR 145 (CA) at 267, and endorsed by the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45 at [33], per Elias CJ and Anderson J.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law. In *Couch*, at [33], Elias CJ and Anderson J said: "*Particular care is required in areas where the law is confused or developing*."

[23] For its part, the Council argued that no application to amend the pleadings for solely declaratory relief had been made by Ngāti Tama, and that the close of pleadings date had now passed so that leave was required under r 7.7 of the High Court Rules. Mr Thomsen further argued that the wording of the declarations sought was also of significance.

[24] Such technical issues have reduced significance in the present situation. As I explain in greater detail below this is a special type of strike out application where these kinds of matters do not have the same significance. By addressing the question of mootness as a preliminary issue such distractions are more clearly avoided.

[25] I proceed on the basis, however, that the present question can be addressed on a strike out basis. I do so on the basis that the complexities raised by Ngāti Tama and the Council only have relevance if they bear on the key question. The key question is whether the Court should continue to consider a judicial review claim for what will now be limited to declaratory relief in circumstances where the underlying issue between the parties may no longer be a live one.

Mootness/Utility

[26] On this key question it is well established that relief can be denied in judicial review proceedings for what broadly can be described as "mootness" or lack of utility. In *Te Whakakitenga O Waikato Inc*, the Court of Appeal described the principles in the following way:[13]

> [39] … there is the concept that the Court will not make orders that have no utility. The Court's time is precious, and it is not the function of Courts to provide abstract opinions. This has been described as an "ancient principle that the law requires no one to do that which is vain and ineffectual" and that relief which has "no utility" will not be granted. Relief may be inappropriate where the applicant has "achieved the substantial result sought", where it would serve no useful purpose, or where the passage of time means it could not have any practical effect. Thus the traditional position in New Zealand has

[13] *Te Whakakitenga O Waikato*, above n 2, at [39] (footnotes omitted).

> been that the Courts will not hear an appeal "where the substratum of the … litigation between the parties has gone and there is no matter remaining in actual controversy and requiring decision"

[27] In that case the applicant challenged her removal as the chairperson of incorporated bodies managing iwi assets. The challenge had been rendered moot because the applicant had been re-elected to the relevant bodies. The Court struck out the judicial review claim as it had no impact on the current situation between the parties, and the precedent value was limited given that it was a "very fact-specific scenario that no longer applies".[14]

[28] On the other hand, there are cases when there is no prospect of judicial review relief such as an order requiring reconsideration, but the claim has precedent value. In *Reuters Homes Ltd v Wanganui District Council*, Dobson J dealt with such a case in relation to a challenge to decisions made by a local authority to exercise information gathering, and public notification powers under the RMA, apparently in an effort to get a developer to change its proposals to those more agreeable to the authority. The consent was ultimately granted in the form the developer desired, however. It nevertheless pursued its challenge to the earlier decisions. Dobson J held:[15]

> [51] Here, the developer has obtained resource consent for the development substantially as it proposed, and certainly without being required to comply with the WDC's wishes on road connectivity. There has been no suggestion of any claim to recover any additional costs that may have arisen as a result of WDC's invocation of ss 92 and 95C. However, the point is not moot. Declaratory relief could have some practical value because such conduct is likely to recur, if not for this developer then for others, and certainly for territorial authorities. Use of statutory powers arising in the pre-determination stages of processing resource consent applications is a matter of some importance. It is not an issue on which the Court should decline to provide a ruling on the basis that it can no longer affect the course of relevant dealings between the developer and the local authority, in the immediate context.

[29] There are numerous other examples of cases involving claims of mootness, which are helpfully summarised in the *New Zealand Judicial Review Handbook*.[16]

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14 At [48].

15 *Reuters Homes*, above n 5, at [51] (footnote omitted).

16 Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [19.6] and [19.7].

[30] The question here is where the present case fits in light of such principles. Ultimately the Court is determining an issue relating to the discretion as to relief in judicial review. Recent authority has stressed the importance of flexibility in this area.[17] It is important to concentrate on the full facts and circumstances of the case. This can be done in a preliminary way, including on a strike out application, if the Court is able to get the necessary understanding of the facts and circumstances relevant to the discretion as to relief. In this context, some of the language of strike out, such as arguability, and assuming the pleaded facts are correct, have less relevance.

Nature of the challenge

[31] It is important first to understand the nature of the challenge. This is a further challenge to a decision made under s 125 of the RMA to extend the lapse date following the earlier orders of the Court directing a reconsideration of that decision. The reconsideration decision is set out in a formal decision paper provided to KVW by letter dated 4 August 2017.

[32] For the reasons identified with greater particularity below, it is accepted that the decision was no longer of any legal significance to the parties. The further date to which the consent was extended to, 31 May 2018, has past. The resource consent was not given effect to, and it has lapsed. Counsel for Ngāti Tama argued, however, that the issues raised in its challenge have significant precedent value. Mr Hovell argued that it raised the following important issues:

> (a) The legal threshold for determining when a potentially affected person's views should be considered on an application to exten[d] a lapse date;
>
> (b) Whether TDC should have consulted with Ngāti Tama as mana whenua in making its assessment under section 125 of the RMA or how it should have otherwise taken into account the principles of the Treaty of Waitangi in exercising its function under this section, and by implication, what ought to occur in respect of future applications under section 125 of the RMA. To illustrate this point, TDC argues that consultation was not required in respect of its decision under section 125 which is an issue of some significance in the context of decisions under the RMA;

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[17] See *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408 at [48]; and *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

(c) Whether TDC was required to take into account the water conservation order application over the springs;

(d) Whether TDC had adequate information and whether it ought to have taken steps to acquire further information;

(e) Whether TDC took into account the changed planning context and undertook a proper interpretation of the objectives and policies of the Tasman Resource Management Plan, and in particular whether "water banking" was a matter TDC was required to consider in its extension decision;

(f) How the principles of the Treaty of Waitangi should be taken into account in the context of the statutory decisions.

[33] I do not need to consider all of these formulations of the challenge in detail. It is sufficient to say that Ngāti Tama's challenge is strongly arguable on a key point, which may be reflected in one or more of the more detailed points Mr Hovell identified. In *Body Corporate 97010 v Auckland City Council*,[18] the Court of Appeal held that the passage of what was then the terms of s 125 gave statutory confirmation to the philosophy outlined by the Planning Tribunal in *Katz v Auckland City Council*, where the Tribunal said:[19]

> There are compelling reasons of policy why a planning consent should not subsist for a lengthy period of time without being put into effect. Both physical and social environments change. Knowledge progresses. District schemes are changed, reviewed and varied. People come and go. Planning consents are granted in light of present and foreseeable circumstances as at a particular time. Once granted a consent represents an opportunity of which advantage may be taken. When a consent is put into effect it becomes a physical reality as well as a legal right. But if a consent is not put into effect within a reasonable time it cannot properly remain a fixed opportunity in an ever-changing scene. Likewise, changing circumstances may render conditions, restrictions and prohibitions in a consent inappropriate or unnecessary. Sections 70 and 71 of the Act give legislative recognition and form to these matters of policy which, in the ultimate, do but recognise that planning looks to the future from an ever-changing present.

[34] Section 125 has since been changed again, but as Thomas J indicated in her earlier judgment, its reference in s 125(1A)(b)(iii) to the effect of the extension on the policies and objectives of any plan or proposed plan requires councils to consider the effect of the extension not only on the planning instruments, but on the policies and objectives of those instruments.[20] Changes to the planning framework itself may be

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18 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).
19 *Katz v Auckland City Council* (1987) 12 NZTPA 211 at 213.
20 *Ngāti Tama ki Te Waipounamu Trust*, above n 1, at [104].

relevant. But the focus is on the effect of the extension on what the planning framework is seeking to achieve. So how that framework would apply to changed factual circumstances may be just as relevant. If granting an extension would allow an activity to occur that is now inconsistent with those objectives, and/or causes prejudice to them, councils will need to take that into account.

[35] Here there was a significant change in the planning context. Ngāti Tama strongly opposes the activities, when 13 years earlier its predecessor had consented to them. The extent of its interests in the Te Waikoropupū Springs and the Tākaka River catchment have also now been formerly acknowledged in the Settlement Act. There was no previous cultural assessment because of the unanimous iwi consent. There may now be a different understanding of the relevant cultural dimension. The policies and objectives of the planning framework in relation to cultural factors needed to be considered given these changes. Extending the consent may now undermine or prejudice such objectives given what is now understood.

[36] This does not appear to have been addressed in the new decision. That decision noted Ngāti Tama's opposition, and the adverse effects that it raised, but reached the view that "these effects arise from the exercise of the consent itself, not the effects of the extension" (at 5). Then in relation to s 125(1A)(b)(iii) the decision-maker said that the policies recognised the possibility of involving iwi in the management of water resources generally, but (at 7):

> Statutory acknowledgements are a device which has emerged on the planning framework since the original grant of consent whereby iwi must be alerted to all relevant *resource consent applications* and councils must have regard to a statutory acknowledgement in forming an opinion as to whether the relevant claimant group may be adversely affected under Section 95E of the Resource Management Act. I note that Section 125 is not a resource consent application and the notification provisions under Section 95E are not applicable. Nonetheless, I have already concluded above that I do not consider Ngati Tama (or other Te Tau Ihu Iwi) to be adversely affected by the grant of the extension. I do not consider the Treaty Settlement itself to lead to any other or particular adverse effects on Ngāti Tama.
>
> I conclude that notwithstanding the Treaty Settlement and its legislative recognition, the planning context has not changed in a way that means the objectives and policies of the TRMP require reconsideration of the consent or alter my conclusions about the effect of the extension.

[37] It is true that the assessment to be made under s 125 is not the opportunity to reassess whether the consent should have been granted. But it is designed to address any changes affecting the policies and objectives of the plan. Ngāti Tama's opposition, and the formal recognition of the significant importance of the resources to it, are potentially significant to what the planning regime is seeking to achieve. The objective of involving iwi in water management may now be seen as being compromised by the consented activities. It is surprising that this has not been squarely addressed by the decision-maker. It is difficult to not to have some sympathy for the view expressed by the Chair of Ngāti Tama in a passage quoted in the earlier judgment of Thomas J in the following terms:[21]

> It is deeply distressing to go through a Treaty Settlement process, receive our Settlement and acknowledgement from the Crown and receive overlay recognition over our cultural wahi tapu, and then be told by Council that we are not an affected person, and that we have no rights to be engaged or consulted about resource consents that affect our wahi tapu. The process was shameful and disempowering.

[38] I should emphasise that I have considered the nature of the challenge, and its possible strength, in order to understand its importance, and its potential continuing significance. But in terms of the strength of the challenge, the Council's strike out application needs to proceed on the basis that the proceedings should be struck out even if Ngāti Tama turns out to be right in the allegations set out in the first amended statement of claim.

[39] I should also say that I do not accept the Council's argument that the proposed declarations needed to be formulated. An appropriate declaration here may simply have been a declaration that the decision was not lawfully made.

The current position

[40] Notwithstanding the nature and importance of Ngāti Tama's challenge, what is critical is that the consent that was granted has now lapsed. Any issue that now arises in relation to these resources, and Ngāti Tama's interest, will be addressed under different sections of the RMA in relation to any application for further resource

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21 *Ngāti Tama ki Te Waipounamu Trust*, above n 1, at [68].

consents. If there is any further contest between the parties it will now be on a different battlefield. Any consideration under s 125 is now not relevant.

[41] In his submissions Mr Thomsen also pointed out that there are at least two very significant changes to the planning framework for the future. First, Ngāti Tama and others have applied for a water conservation order covering both the Te Waikoropupū Springs and the Arthur Marble Aquifer. A Special Tribunal has been appointed by the Minister under Part 9 of the RMA. It has mostly heard the application. I understand that the Council supports the making of the order over the Te Waikoropupū Springs, but not over the Arthur Marble Aquifer. In addition, and as a consequence of the National Policy Statement for Freshwater Management, a plan change entitled the "Tākaka Freshwater Management Unit Plan Change" is in train. That change is not yet finalised, or notified, and currently has no legal effect. It is on hold awaiting the decision of the Special Tribunal on the water conservation order.

[42] What these changes make plain is that the legal framework for any future decision-making will now be very different. I did not understand Mr Hovell to really dispute that. Importantly it means that the current challenge not only has no relevance in any practical terms between these parties, but also that it is most unlikely that s 125 will be called upon again as between these parties. Or at least if it is it will be against the background of a different planning regime.

Precedent value

[43] Ultimately, therefore, this judicial review challenge can only have significance if it has what can be described as precedent value. Mr Hovell relied on the approach adopted in *Reuters Homes Ltd v Wanganui District Council* in that context.[22] Does this case have potential relevance for Ngāti Tama, or other iwi who may be placed in similar circumstances?

[44] In my view, it is very difficult to see how such precedent value could really arise. That is because the present case involves such unusual circumstances. An iwi initially gave its consent to the granting of a resource consent some 13 years ago, in

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22 *Reuters Homes Ltd*, above n 5.

connection with a joint venture operation involving other iwi interests, but it now strongly opposes the activities. The nature of its interests are now more fully recognised in a Treaty settlement process that has occurred in the interim. That involves a highly unusual set of circumstances for consideration under s 125.

[45] In my view, it is most unlikely that such circumstances will present themselves again in the future in a substantially similar way. And if there is a case that has similarities to the present circumstances, it is almost inevitable that it will turn on its own facts and circumstances. Any decision in the present proceeding seems to me to have limited potential precedent value.

[46] Mr Hovell argued that it may not be unusual for consents to be in existence where subsequent Treaty settlements result in greater formal recognition of interests in the underlying resources. That may be the case, but what is unusual here is the application of s 125 when a resource consent has not been given effect to, and there is a request to extend the lapse date, when the earlier resource consent was granted following the express approval of the relevant iwi that now opposes it. These strike me as quite unusual circumstances.

[47] Moreover, there is already a High Court precedent relating to the facts and circumstances of this case – that is Thomas J's judgment. Some precedent value that the existing judgment does not already have needs to be identified. And to the extent that the challenge to the reconsideration decision will involve different features to those addressed in the earlier judgment this simply demonstrates the extent to which any case in the future will likely turn on its particular facts and circumstances.

[48] In assessing whether these proceedings should nevertheless continue through to final judgment, I take into account the importance of the right to have access to the Court to challenge decisions by way of judicial review as reflected in s 27 of the New Zealand Bill of Rights Act 1990, and that decisions that may be seen as relevant to the application of the principles of the Treaty potentially have public importance, as effectively acknowledged in s 74(3) of the Senior Courts Act 2016. But notwithstanding those points, the facts and circumstances of this case are so unusual that I cannot see any real precedent value in a further decision of the Court.

Proceedings continued to resolve costs?

[49] Ngāti Tama argued that this proceeding should continue to resolve the question of the entitlement to costs already incurred in the pursuit of it. The Council suggested that was not an appropriate approach. On being asked, Mr Thomsen indicated that he thought the award of costs to date on the underlying proceedings on a 2B basis would be approximately $16,000, and a costs award on the strike out application would be approximately $8,000.

[50] I do not think it appropriate for the Court to allow the proceeding to continue simply for the purpose of deciding who should bear the cost of it. If a proceeding should no longer continue because it serves no useful purpose, then it should not continue for the question of costs alone. During the hearing, the Council not only indicated its view that costs should lie where they fall on the substantive proceeding, but also said that it would not seek costs on the strike out application even if it succeeded. That seems to me to be a sensible and just outcome, and I am grateful to the Council for moving to that position.

Result

[51] For the above reasons, I conclude that the proceedings no longer have any utility, and should be struck out.

[52] There will be no order for costs on either the strike out application, or on the judicial review proceedings generally.

Cooke J

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