**IN THE HIGH COURT OF NEW ZEALAND**
**TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TAURANGA MOANA ROHE**

**CIV-2018-470-17**
**[2018] NZHC 643**

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| BETWEEN | NGAI TE HAPU INCORPORATED and NGA POTIKI A TAMAPAHORE TRUST<br>Appellants |
| AND | BAY OF PLENTY REGIONAL COUNCIL<br>First Respondent |
| | ASTROLABE COMMUNITY TRUST<br>Applicant |

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| Hearing: | 9 April 2018<br>(Heard at HAMILTON) |
| Appearances: | T Hovell for Appellants<br>R Zame for First Respondent<br>M Casey QC for Second Respondent |
| Judgment: | 11 April 2018 |

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**JUDGMENT OF LANG J**
**[on application for waiver of security for costs]**

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*This judgment was delivered by me on 11 April 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date……..*

[1] This appeal arises out of the grounding of the MV *Rena* on the Otaiti Reef (sometimes known as the Astrolabe Reef) on 11 October 2011. In a series of decisions issued between 18 May 2017 and 7 December 2017, the Environment Court granted a resource consent to the second respondent, the Astrolabe Community Trust (the Astrolabe Trust), permitting it to abandon the vessel on the reef as from 1 April 2016 and for contaminants from the vessel to be discharged as from that date. The two appellants, Ngai Te Hapu Incorporated (Ngai Te Hapu) and the Nga Potiki a Tamapahore Trust (Nga Potiki), have appealed against the decision issued by the Environment Court on 7 December 2017 finalising the conditions on which consent was granted.[1]

[2] The appellants now seek an order waiving the requirement that they provide security for the costs of the Astrolabe Trust and the Bay of Plenty Regional Council (the Council) on the appeal.

**Relevant principles**

[3] Rule 20.13 of the High Court Rules 2016 relevantly provides as follows:

> **20.13 Security for appeal**
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> (1) This rule applies to an appeal other than an appeal for which the appellant has been granted legal aid under the Legal Services Act 2000.
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> (2) The Judge must fix security for costs at the case management conference relating to the appeal, unless the Judge considers that in the interests of justice no security is required.
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> (3) The amount of security must be fixed in accordance with the following formula, unless the Judge otherwise directs:
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> $$(a \div 2) \times b$$
>
> where—
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> a is the daily recovery rate for the proceeding as classified by the Judge under rule 14.4; and
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> b is the number of half days estimated by the Judge as the time required for the hearing.

[1] *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 73.

(4) Security must be paid to the Registrar at the registry of the court no later than 10 working days after the case management conference, unless the Judge otherwise directs.

(5) Except in the case of an appeal under the District Court Act 2016 (where non-compliance with the security order results in a deemed abandonment of the appeal under section 126 of that Act), if the security is not paid within the time specified under subclause (4), the respondent may apply for an order dismissing the appeal.

…

[4] There is no dispute regarding the principles that apply in the present context. They have been confirmed by the Supreme Court in several recent decisions, including *G v Chief Executive of the Ministry of Social Development*[2] and *Reekie v Attorney-General.*[3]

[5] The guiding principle is that an appellant will generally be required to provide security for the respondent's costs. Security may be waived where it is in the interests of justice for that to occur, but exceptional circumstances will be required. In considering an application for waiver the Court is entitled to have regard to the importance of the issues raised by the appeal and the public interest in determining those issues. Although impecuniosity is not usually sufficient without more to justify a waiver, it may affect the quantum of security ordered.

**Background**

[6] After the vessel was grounded on the reef the Director of Maritime New Zealand issued a series of notices under the Maritime Transport Act 1994 (MTA) requiring the owner of the vessel to remove it from the reef. The owner and its insurer then made extensive efforts to remove containers from the vessel and to dismantle it. It was also necessary for volunteers to undertake large-scale efforts on the shore line to clean up contaminants discharged from the vessel. The Director withdrew the notices under the MTA on 31 March 2016, no doubt on the basis he was satisfied the remainder of the wreck no longer posed a danger to shipping.

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2 *G v Chief Executive of the Ministry of Social Development* [2010] NZSC 141, (2010) 20 PRNZ 705.

3 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

[7] At or about this time, those associated with the ownership and insurance of the vessel established the Astrolabe Trust as a charitable trust for the purpose of seeking a resource consent from the Bay of Plenty Regional Council (the Council) authorising the abandonment of the remainder of the vessel on the reef and the discharge of contaminants from it in the future.

[8] After the Astrolabe Trust applied for resource consent in May 2014, the Council received numerous objections. The Council initially decided to refer the matter directly to the Environment Court, but subsequently referred the application to independent Commissioners for decision. There was extensive opposition to the application at the hearing before the Commissioners. After a hearing that occupied approximately four weeks, the Commissioners granted the resource consent subject to a large number of detailed conditions.

[9] The appellants and five other interested parties then appealed to the Environment Court against the Commissioners' decision. By the time the Environment Court came to consider the matter, however, the present appellants were the only parties actively pursuing their appeals. They were supported by five other interested groups. The Astrolabe Trust opposed the appeal, supported by the Council and eight other interested parties.

[10] The hearing in the Environment Court lasted for approximately three and a half weeks. The Court delivered its first substantive decision on 18 May 2017.[4] In this decision the Court granted consent for the abandonment of the vessel from 1 April 2016 and for the discharge of contaminants from the vessel from that date. It also issued draft conditions of consent, and directed the parties to consult regarding these in an effort to reach agreement. The Environment Court subsequently issued further decisions on 16 October 2017,[5] 31 October 2017[6] and 15 December 2017[7] in which it finalised the conditions of consent. In the decision issued on 15 December 2017, the

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4 *Ngai Te Hapu Inc v Bay of Plenty Regional Council,* above n 1.
5 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 169.
6 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 180.
7 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2017] NZEnvC 206.

Environment Court also directed that the costs of all parties were to lie where they fell.[8]

**The appeal**

[11] The appeal purports to relate to the final decision issued on 15 December 2017, but in reality it extends also to the decision issued on 18 May 2017 in which the Environment Court granted consent to the abandonment of the wreck and the future discharge of contaminants.

[12] The notice of appeal filed on 30 January 2018 is a wide-ranging document alleging more than 50 separate errors on the part of the Environment Court. Although the appellants subsequently filed Points on Appeal on 20 March 2018, these do not reduce the proposed scope of the appeal to any discernible degree. The apparent breadth of the appeal has prompted the Court to allocate three days for the appeal to be heard in June 2018.

**The security sought**

[13] The Astrolabe Trust seeks security calculated on a Category 3 basis because it will be required to respond to virtually all of the grounds of appeal advanced by the appellants. The Council acknowledges that its role is likely to be more limited. For that reason it suggests the appellants provide security for its costs calculated on a category 2 basis. Counsel agree that, applying the formula contained in r 20.13, security calculated on a Category 3 basis would amount to $9,900 whilst security calculated on a Category 2 basis would amount to $6,690.

**Analysis**

[14] I now consider the factors I consider to be relevant to the appellants' application for waiver of security.

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8 At [62]-[63].

*The merits of the appeal*

[15] It is obviously neither possible nor appropriate to consider the merits of the appeal in any detail. In *Reekie*, however, the Supreme Court observed that the costs regime, including the requirement to provide security, imposes discipline on litigants because it provides a disincentive to commence frivolous proceedings. A litigant who will not be able to meet a subsequent order for costs is free from the constraints that affect other litigants, and this creates potential for injustice to the opposing party. Some assessment of the merits is therefore required, along with an assessment of whether the appeal raises issues of public interest.[9]

[16] The appellants only enjoy a right of appeal to this Court on questions of law.[10] Notwithstanding this restriction several of the proposed grounds of appeal appear to constitute challenges to factual decisions made by the Environment Court. By way of example, the notice of appeal alleges that the Environment Court erred "by dismissing effects on people and communities based on the cultural conditions that affect them". Similarly, the appellants contend the Environment Court erred "in dismissing past effects associated with the wreck and its aftermath". Both grounds of appeal appear to be challenges to factual findings made by the Environment Court and as such could not be considered by this Court.

[17] Many of the grounds of appeal relate to the decisions made in the first substantive decision issued on 18 May 2017. The appellants ought to have filed any appeal against that decision within 15 working days of being notified of it.[11] Although this Court may grant leave to appeal out of time,[12] no application for an extension of time has yet been filed.

[18] In addition, the notice of appeal seeks only that the appeal be allowed and the matter referred back to Environment Court for reconsideration in light of the findings of this Court. An obvious question arises as to the purpose for which the matter is to be referred back to the Environment Court for reconsideration. It is not at all clear

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9 *Reekie v Attorney-General,* above n 3, at [27] and [33].
10 Resource Management Act 1991, s 299.
11 Resource Management Act 1991, s 300(1).
12 Resource Management Act 1991, s 306.

from the notice of appeal whether the appellants contend the alleged errors of law led the Environment Court to grant the resource consent in circumstances where, but for the errors, it would have declined the application. If so, that would leave the wreck of the vessel lying on the reef on an unauthorised basis and any further discharge of contaminants would likewise not be authorised. It would also leave the Council to monitor the wreck and deal with the discharge of contaminants at its own cost in the first instance. As matters currently stand, the Astrolabe Trust is responsible for meeting the cost of monitoring the wreck and dealing with any contaminant issues that might arise. Normally a notice of appeal sets out the object the appellant is endeavouring to achieve through the appeal process. That is not evident in the present case.

[19] Furthermore, the only obvious challenge to the conditions imposed by the Environment Court relates to conditions imposed regarding removal of pieces of the wreck in the future. The appellants challenge these conditions because that activity will require a resource consent and the conditions "defer the assessment to a future process/third party". Mr Casey QC for the Astrolabe Trust submits that this condition was imposed in response to claims by the appellants that the owner should make further attempts to remove the wreck. It is therefore somewhat ironic, he contends, that this is the only condition the appellants now challenge.

[20] One of the grounds of appeal relates to the decision that all parties should bear their own costs. That is obviously a discretionary decision, and the Environment Court appears to have approached it on a principled basis. There may therefore be little scope for challenging this aspect of its decision. Furthermore, Ngai Te Hapu seeks to appeal against the decision even though it did not seek costs in the Environment Court.

[21] All of these factors suggest the appellants are unlikely to have an easy task in this Court. Mr Casey submits that the manner in which they have approached the appeal may have been influenced by the fact that their counsel, Mr Hovell, is also a trustee of Nga Potiki. Mr Casey suggests this may have resulted in the proposed grounds of appeal not being scrutinised with the rigour that independent counsel could be expected to apply. I consider there is some force in this submission.

[22] Added to this is the fact that the issues raised by the appeal have now been the subject of very detailed consideration by two specialist bodies. The panel of Commissioners comprised a recently retired Judge of the Environment Court, a marine ecologist, a Maori cultural expert and an engineer. The panel of the Environment Court that heard the appeal comprised an Environment Judge, an Alternate Environment Judge and two experienced Environment Commissioners. Both hearings occupied several weeks and resulted in very detailed decisions being issued. This suggests that the issues the appellants now wish this Court to consider have already been well ventilated in the earlier proceedings. There is certainly no substance to Mr Hovell's submission that an order requiring the appellants to provide security will result in their claim being stifled.

[23] Overall I consider the likely merits of the appeal support a requirement for security to be provided.

*Impecuniosity*

[24] Ngai Te Hapu is an incorporated society that was formed in July 2013 following the grounding of the *Rena.* It apparently has no assets. A spokesperson for the Society, Mr Buddy Mikaere, deposes that any order requiring the society to provide security will force it to consider fundraising activities if the appeal is to proceed.

[25] Nga Potiki is a trust formed for the express purpose of managing assets to be acquired through settlement of treaty claims. Its chairperson, Mr Colin Reeder, deposes that those assets have not yet been received, and there would in any event be a concern if they were to be deployed to meet an order for security made in the present proceeding. He also says there would be an injustice if the Trust was required to use treaty settlement assets to address modern environmental issues.

[26] I acknowledge the concerns expressed by both appellants. I do not consider, however, that they amount to an assertion that the appeals will not be able to proceed if security is ordered. The amount sought by way of security is relatively modest given the amounts expended by all parties on the proceedings to date. It ought to be possible for the necessary funds to be raised through the collective efforts of members of both

organisations. I therefore do not regard the financial position of the appellants to be a factor counting against security being required.

*Procedural history*

[27] The appellants contend that the present case is exceptional because it involved the application for resource consent being determined first by the Commissioners and then by the Environment Court. They say the unusual feature of this process is that it departed from the procedure initially agreed to by the Council, which was for the application to be referred directly to the Environment Court.

[28] The evidence filed by the Astrolabe Trust suggests, however, that the Council made the decision to have the application determined by the Commissioners after it learned of comments in the news media suggesting that local iwi were concerned they might be prejudicially affected if the matter proceeded directly to the Environment Court. This appears to have underpinned the Council's decision to reverse its initial decision and have the application determined in the first instance by the Commissioners. The Council cannot be criticised for taking a step that was designed to ensure that objectors were not placed in a position of disadvantage. It is difficult in any event to see how this factor could have any bearing on whether the appellants should now be required to provide security for a further appeal.

*Public interest*

[29] The appellants maintain there is significant public interest in the outcome of the appeal. They point out that the grounding of the *Rena* was an issue of major public importance from an ecological and environmental standpoint, and that the issues raised by the appeal remain of considerable importance notwithstanding the time that has elapsed since the grounding occurred.

[30] I acknowledge that the grounding of the vessel was a matter of enormous significance for the Bay of Plenty coastal community. It presented a huge ecological challenge because the wreck posed a threat to the environmental wellbeing of a large portion of the eastern shoreline of the Bay of Plenty. In addition, it raised important cultural issues arising out of the fact that a foreign vessel remained stranded on a reef

that had considerable cultural significance for local iwi and hapu. The Environment Court discussed these issues in considerable detail in its first decision issued on 18 May 2017.[13]

[31] I also accept, as do the Council and the Astrolabe Trust, that the appeal has considerable significance for the appellants. This does not mean, however, that it raises issues of public interest. For the most part the appeal raises issues relating to the procedure adopted by the Environment Court, and the tests it applied in determining the issues before it. The appeal also challenges allegedly irrelevant matters the Court is said to have taken into account, as well as relevant matters it is said to have overlooked. I do not consider those issues have significance beyond the circumstances of the present case.

[32] Furthermore, the grounding of the *Rena* was an isolated event that has no parallel or precedent in New Zealand's history. Hopefully there will be no similar occurrence in the future. For that reason the appeal is unlikely to be of precedential value for similar applications under the RMA in the future.

[33] It is also worth remembering that the Council received more than 150 submissions in response to the application for resource consent. More than two-thirds of these opposed the application. It is significant in my view that the appellants and their supporters are now the only parties who seek to challenge the Environment Court's decision. One reason for this may be that the vast majority of persons who initially opposed the application for resource consent have been satisfied with the approach taken by both the Commissioners and the Environment Court.

[34] All of these factors persuade me that the appeal is unlikely to raise any issues of public interest.

**Conclusion**

[35] Whether viewed individually or collectively none of the factors raised by the appellants is sufficient to persuade me this is an exceptional case so that security

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[13] *Ngai Te Hapu Inc v Bay of Plenty Regional Council*, above n 1, at [35]-[105].

should not be ordered. Furthermore, I consider it appropriate to require security to be provided. The Astrolabe Trust and the Council are about to expend significant sums in opposing the appeal because of the breadth of the issues raised in the notice of appeal. The prospect of the appellants meeting any award of costs is slim. If the Astrolabe Trust and the Council are successful, the only realistic way to ensure the appellants contribute to their costs is to require security to be provided. As I have already observed, the appellants ought to have the collective means to find a way in which to provide the security required for an appeal of three days duration.

[36] The Astrolabe Trust and the Council are entitled to be separately represented because they have different interests to protect and these are not aligned. It is therefore appropriate to require the appellants to provide two sets of security. As the Council realistically acknowledges, however, the bulk of the burden in opposing the appeal will fall on the Astrolabe Trust. The sheer number of issues the appellants have raised mean that security calculated on a Category 3 basis is appropriate for the Astrolabe Trust. Security calculated on a Category 2 basis is appropriate for the Council.

**Order**

[37] The appellants are jointly to provide security in the sum of $9,900 for the costs of the Astrolabe Trust and security in the sum of $6,690 for the costs of the Council.

[38] Security is to be provided to the Registrar at Tauranga no later than 11 May 2018. If that does not occur the Astrolabe Trust and the Council may apply for an order under r 20.13(5) of the High Court Rules dismissing the appeal.

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Lang J

Solicitors:
Atkins Holm Majurey, Auckland
Cooney Lees Morgan, Tauranga
Lowndes, Auckland