IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 7/2019
[2019] NZSC 51

BETWEEN	BROOK VALLEY COMMUNITY GROUP INCORPORATED Applicant
AND	BROOK WAIMARAMA SANCTUARY TRUST First Respondent
	MINISTER FOR THE ENVIRONMENT Second Respondent
	NELSON CITY COUNCIL Third Respondent

Hearing:	2 May 2019
Court:	Winkelmann CJ, Glazebrook and O'Regan JJ
Counsel:	S J Grey for Applicant B M Nathan and S Galbreath for First Respondent N C Anderson and N E Pike for Second Respondent C R W Linkhorn and R E Ennor for Third Respondent
Judgment:	21 May 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $4,500 to the respondents (to be divided equally among them, unless they agree otherwise) as well as the respondents' usual disbursements.

REASONS

Background

[1] The applicant (the Society) is an incorporated society. Its members oppose the aerial spread of brodifacoum poison baits in the Brook Waimarama Sanctuary, near Nelson (the Sanctuary).

[2] The first respondent (the Trust) administers the Sanctuary. It sought resource consents under s 15 of the Resource Management Act 1991 (RMA) for an aerial drop of brodifacoum. The consent was granted, subject to 47 conditions. However, prior to the drop occurring the Resource Management (Exemption) Regulations 2017 (the Regulations) were made under s 360(1)(h) of the RMA, exempting from s 15 any discharge of brodifacoum for the purpose of killing vertebrate pests in the specified areas (including the Sanctuary) subject to certain conditions. The Trust then surrendered its resource consents in relation to the proposed aerial drop and relied on the Regulations.

[3] The Society challenged the proposed aerial drop in the High Court[1] and, on appeal, in the Court of Appeal.[2] These challenges failed, as did the Society's attempts to obtain orders preventing the drop from occurring until its appeal rights were exhausted.[3] The drop has now occurred. Both the High Court and Court of Appeal awarded costs against the Society.[4] The High Court discounted its award by ten per cent.[5]

Issues

[4] The Society seeks leave to appeal against the decision of the Court of Appeal. It wishes to pursue three issues:

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1 *Brook Valley Community Group Inc v The Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844, [2018] NZRMA 51 (Churchman J) [HC judgment].

2 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2018] NZCA 573 (French, Cooper and Williams JJ) [CA judgment].

3 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 1947.

4 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZHC 2665, [2018] NZRMA 162 (Churchman J) [HC costs judgment]; and CA judgment, above n 2, at [101].

5 HC costs judgment, above n 4, at [22]. The discount only applied to the costs awards made in favour of the second and third respondents in relation to the substantive proceeding: at [23]. The award in favour of the first respondent was not discounted: at [24].

(a) whether the Regulations are lawful;

(b) whether s 13(1)(d) of the RMA applies and, if so, whether the need for a resource consent under s 13(1)(d) can be avoided by the exemption given by the Regulations; and

(c) whether the costs award in the High Court should have been discounted by more than ten per cent given the public interest nature of the litigation.

The Regulations

[5] The Society wishes to argue that the Regulations are unlawful and invalid. The Regulations were made under s 360(1)(h) of the RMA, which provides:

> **360 Regulations**
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> (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
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> …
>
> (h) prescribing exemptions from any provision of section 15, either absolutely or subject to any prescribed conditions, and either generally or specifically or in relation to particular descriptions of contaminants or to the discharge of contaminants in particular circumstances or from particular sources, or in relation to any area of land, air, or water specified in the regulations: … .

[6] The Society wishes to argue that the Minister's decision in relation to the regulation-making power failed to address public law constraints on his powers, failed to exercise the power in a manner promoting the purposes of the RMA and failed to consider mandatory considerations in Part 2 of the RMA. It also wishes to argue the Minister made material factual errors.

[7] We have considered these arguments and the manner in which they were addressed in the Courts below. Both Courts rejected the proposition that the Regulations were not consistent with the RMA's purpose of sustainable management and the principles supporting that purpose, given that the purpose of the aerial drop of brodifacoum was to protect native flora and fauna from introduced predators. They

also considered in some detail the arguments that the Society wishes to ventilate again on appeal to this Court. We accept that the regulation-making power must be exercised consistently with the purposes of the RMA, but there must be a factual underpinning for the argument that the Regulations are inconsistent with those purposes.

[8] The regulation-making power in s 360(1)(h) is broadly expressed and the geographical area to which the Regulations apply is limited. The aerial drop has now taken place and we are told no further drops are planned, so the proposed appeal would have little practical impact. In these circumstances, we are not persuaded that any miscarriage of justice arises from the decisions of the Courts below. Nor do we consider that the issue is a matter of public importance justifying a further appeal.

Section 13(1)(d)

[9] The Society's argument is that s 13(1)(d) is engaged where an aerial drop of brodifacoum involves the poison baits being deposited on the bed of a river, in addition to s 15. It says the exemption from s 15 given under the Regulations does not extend to s 13(1)(d).

[10] Section 13(1)(d) prohibits the deposit of any substance in, on, or under the bed of any lake or river, unless expressly allowed under a national environmental standard, a rule in a regional plan or a resource consent. In the present case, the Society argues that if s 13(1)(d) applies, the aerial drop required a resource consent because the Regulations provide an exemption from s 15 only.

[11] Section 15 deals with the discharge of contaminants. It prohibits (among other things) the discharge of contaminants into water or onto land in circumstances where the contaminant may enter water, unless expressly allowed under a national environmental standard, a rule in a regional plan or a resource consent.

[12] The Courts below rejected the Society's argument for different reasons. In the High Court, Churchman J held that ss 13 and 15 complemented each other, rather than providing for duplicative processes.[6] He considered the reference to a "substance" in

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6 HC judgment, above n 1, at [65].

s 13(1)(d) was limited to something benign that will have a physical effect on the landscape or topography of beds of rivers or lakes when used.[7] In contrast, he considered the reference to contaminant in s 15 described a type of substance with a chemical, biological or physical effect on the condition of the bed or other location.[8] In addition, Churchman J noted that s 13 dealt with actions involving direct and intentional physical activity. In contrast, s 15 focuses on the effect of a wide range of activities. He was therefore satisfied the wording of s 13 was not intended by Parliament as a secondary hurdle to resource consents granted under s 15.[9]

[13] The Court of Appeal took a different approach. It considered that s 13(1)(d) and s 15 should be construed in light of the overall context of Part 3 of the RMA. When this was done, it was clear that s 13(1)(d) and s 15 should be construed so they did not capture the same action twice.[10] So a consent to discharge a contaminant under s 15 would necessarily embrace any eventual contaminant on the bed of a river if that is where it came to rest.[11]

[14] For our part we think s 13(1)(d) may be concerned with structures or objects rather than the product of an aerial discharge. Whether that is so or not, we see the Society's argument as fact-specific and therefore it does not raise a matter of public importance. We also do not consider there is sufficient prospect of success for the argument that duplicative consents must be sought from the same consent authority for precisely the same activity to justify a further appeal.

Costs – public interest

[15] The costs question may involve a matter of public importance but we do not see this case as an appropriate case to address that issue. The determination of a discount of ten per cent was fact-specific and there is no appearance of a miscarriage in the way the Court of Appeal addressed the issue. We understand the costs have not been paid in any event.

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7 At [61].
8 At [61].
9 At [67].
10 CA judgment, above n 2, at [78]–[79].
11 At [80].

Result

[16] The application for leave to appeal is dismissed.

Costs

[17] The Society must pay costs of $4,500 to the respondents (to be divided equally among them, unless they agree otherwise) as well as the respondents' usual disbursements.

Solicitors:
Duncan Cotterill, Nelson for First Respondent
Crown Law Office, Wellington for Second Respondent