IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CIV-2022-463-105
[2022] NZHC 2924

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review
BETWEEN	WHARENUI CLYDE TUNA Applicant
AND	TE UREWERA BOARD, being the board established under s 16 of Te Urewera Act 2014 First Respondent
	TRUSTEES OF TŪHOE – TE URU TAUMATUA, being the trust referred to as Tuhoe Te Uru Taumatua in Te Urewera Act Second Respondent
	THE DIRECTOR-GENERAL OF CONSERVATION Third Respondent

Teleconference:	7 and 8 November 2022
Appearances:	W Aldred and TWR Lynskey for Applicant P Beverley for First and Second Respondents J Gough for Third Respondent
Judgment:	8 November 2022

JUDGMENT OF WOOLFORD J
[Interim relief]

This judgment was delivered by me on Tuesday, 8 November 2022 at 4:45 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

[1] The applicant, Wharenui Clyde Tuna's whakapapa connects him to all the hapū of Waimana and other hapū across Te Urewera. He has a relationship with Te Urewera that transcends the physical contemporary world, a relationship that is founded in past, present and future generational connection with Te Urewera. Te Urewera forms part of his spiritual identity, it brings peace and comfort, it brings spiritual enlightenment and contentedness.

[2] The applicant objects to the current what he says is hasty destruction by fire of the hut network throughout Te Urewera by the second respondent, Tūhoe – Te Uru Taumatua (TUT), the operational entity of the first respondent, Te Urewera Board (TUB). He seeks an interim order requiring the second respondent immediately to cease its programme of destruction of listed huts pending final disposition of this proceeding. The application is made on a without notice basis because of its urgency, but the respondents were served with the proceeding to allow them to have some input.

[3] I held telephone conferences with counsel representing all parties on 7 and 8 November 2022. Counsel for the first and second respondents advised the Court that he had instructions to strongly resist any interim order but was not in a position to give an undertaking to cease the programme of the demolition or removal of the huts pending a hearing of the application for an interim order. Counsel for the third respondent agreed that the first and second respondents should be heard before any interim orders were to be made.

[4] Counsel for the first and second respondents has advised the Court that the parties should be in a position to propose a timetable for the hearing of the application for an interim order by 18 November 2022. However, the issue of protection of the applicant's position remains as an undertaking is not available. It is therefore necessary for me to review the application to determine whether I should grant an interim interim order to protect the applicant's position until the application for an interim order can be argued.

Factual background[1]

[5] The applicant, Mr Tuna, is of Tūhoe and Te Whakatāne hapū and resides in the Waimana Valley. He has spent his whole life in the Waimana Valley and draws particular identity and strength from his connection with Te Whakatāne hapū. He has used the huts, which are the subject of this proceeding, for recreation and the gathering of food since he was a child.

[6] The first respondent is the board established under s 16 of Te Urewera Act 2014 (the Act), charged with the governance and management of Te Urewera. The second respondent is the Tūhoe Trust established by a trust deed, dated 5 August 2011, and referred to in the Act as Tūhoe Te Uru Taumatua (the trust deed having been amended and restated by a further trust deed, dated 13 December 2013). The third respondent is the Director-General of Conservation, who retains certain functions in relation to Te Urewera under the Act.

[7] Prior to and during its designation as Te Urewera National Park, Te Urewera contained a network of huts which were and remain in Crown ownership administered by the Department of Conservation. The oldest of the huts were erected in the 1950s, while others are of more modern construction.

[8] The huts have been extensively used by Tūhoe and the general public, including trampers and hunters as a base for their activities in Te Urewera. The huts have provided shelter for hapū of Tūhoe when visiting Te Urewera to gather food, for cultural purposes, or for recreation.

[9] Some of the huts are "biodiversity" huts that are not used by the public, but are located around core conservation areas. They are used to provide accommodation and as a base for conservation personnel for biodiversity work, including trapping predators and monitoring rare taonga species, including, but not limited to kōkako, kiwi, kākā, whio and mistletoe.

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1 The factual background is taken entirely from the documents filed by the applicant, including four affidavits. I have received no documentation from the other parties.

[10] Following the settlement of Tūhoe's historical Treaty of Waitangi claims in 2013, Te Urewera was declared by the Act to be a legal entity and its governance and management vested in the first respondent. Crown improvements within Te Urewera (including the huts) remain vested in the Crown, subject to the powers of the Chief Executive of the second respondent and the third respondent under s 95 of the Act to use, occupy, access, maintain, remove or demolish them, provided that is in a manner that is consistent with the management plan of the first respondent and the annual operational plan of the second respondent prepared under s 53 and in accordance with cl 24 of the Second Schedule to the Act.

Resolution to decommission DOC structures

[11] The minutes of a meeting of the first respondent on 15 February 2022 record:

> **Responsibility for Health & Safety**
>
> Tūhoe wish to free DOC from its H&S legal obligations by working together to remove their entire assets structures infrastructure from Te Urewera. Tūhoe will start by collating and returning all DOC equipment on loan and purchase their own. Then as the shared annual operations plan, assist with the removal of huts and eventually bridges. There are at least 10 huts not fit for purpose – not repairable. DOC to make a decision about the others, work out a sequence and cost. Tūhoe have no want or need to retain the existing structures new constructions to be financed by Tūhoe.
>
> The removal of all assets is very symbolic to the legislation.
>
> DOC agreement to this focus for 2022-23 would restart open conversation with Tūhoe.

[12] The following discussion is then recorded in the minutes of a meeting of the first respondent on 17 May 2022:

> **The way ahead – A way ahead** is tricky because of the ever presence of too many unresolved serious troubles that have brought us to this point of despair. Needing to know if we can, do we want to, how do we fix that back stuff so we have reason hope and trust to go ahead? These can be snakes and ladders. We need more than kind words and good sentiments. We need action on every commitment the decommissioning of DOC structures the exit of DOC infrastructure is that action we need actioned.

[13] The first respondent then records passing a resolution as follows:

> United with Tūhoe Te Uru Taumatua the Te Urewera Board supports the decommissioning of all DOC structures and infrastructure from Te Urewera.

[14] The resolution was passed during the general business section at the end of the meeting and had not been placed on the agenda for the meeting. At the time of the resolution, the representative of Waimana Valley hapū (collectively referred to as the Waimana Kaaku Tribal) who sat on the first respondent Board was Marewa Titoko. Ms Titoko abstained from voting because she had no prior notice of the motion regarding decommissioning of DOC structures and had accordingly not been able to share information about it with the hapū she represented. Ms Titoko, accordingly, advised the first respondent Board that she could not vote in the absence of endorsement of Te Waimana Kaaku Tribal. The minutes record:

> Marewa abstained from the resolution citing need to receive endorsement from the Waimana Kaaku tribal.

Destruction of huts commences

[15] In or about early October 2022, the second respondent announced its intention to commence removal of the huts. In or about early October 2022, the second respondent, through its contractors or employees, burned down the Kanohirua hut near Maungapōhatu. Between the burning down of the Kanohirua hut and the end of October 2022, the applicant believes that between 15 and 20 huts have been burnt down by employees or contractors of the second respondent. Notwithstanding what the applicant says is significant negative reaction to the destruction of the huts from members of Tūhoe and the wider public, it is apparent that the second respondent intends to continue with its project to destroy the huts. Its publicly stated objective is to have destroyed them all before Christmas 2022.

[16] The applicant says that the destruction of the huts that has occurred and is continuing to occur has caused great distress and loss of wairua for the applicant and affects his Tūhoetana.

Alleged errors in process

[17] The applicant asserts that proper process has not been followed. He says the first respondent:

(a) Failed to act in accordance with the principles stated in s 5(1) of the Act, including the preservation of the historical and cultural heritage of Te Urewera.

(b) Failed to take into account the requirement in s 5(2) of the Act to act so that the public has freedom of entry and access to Te Urewera, subject to any conditions and restrictions that may be necessary to achieve the purpose of the Act or for public safety.

(c) Failed to consider and provide appropriately for the relationship of iwi and hapū with their culture and traditions with Te Urewera, as it is required to do so by s 20 of the Act. In particular:

(i) It provided no opportunity for hapū to consider and provide comment on the proposed motion; and

(ii) The resolution is inimical to the relationship of the applicant's hapū and its culture and traditions with Te Urewera.

(d) Failed to consult with hapū by giving hapū or their representative, Ms Titoko:

(i) Prior reasonable notice of the motion; and

(ii) Information about the proposed approach to decommissioning sufficient to enable hapū to reach an informed view before the motion was considered by the first respondent.

(e) Failed to consult with the wider public regarding the potential impact on free public access to Te Urewera.

[18] The applicant also asserts that the second respondent made similar failings, in particular by acting in reliance on the resolution of the first respondent, which was unlawful and invalid.

[19] Finally, the applicant refers to the lack of an annual operational plan prepared in accordance with s 53 of the Act. He says that s 53 of the Act provides that each year the second and third respondents must prepare an annual operational plan for the operational management of Te Urewera in the following year. He says no operational plan has been prepared by the second and third respondents for the 2022 year. Section 95 of the Act provides that Crown improvements remain vested in the Crown and may only be demolished in a manner that is consistent with the management plan and the annual operational plan.

[20] In the absence of an operational plan prepared in accordance with s 53, a condition of the lawful demolition of the structures has not been met and, accordingly, such demolition is unlawful. The applicant says the second respondent's actions in destroying the huts or causing them to be destroyed was not otherwise authorised by law.

Affidavits in support

[21] The applicant has filed four affidavits in support of his claim for interim relief. In his affidavit, the applicant says he is concerned about the loss of free access to Te Urewera for himself, his whānau and hapū to use the huts as a base for food gathering, recreational and cultural purposes.

[22] A conservationist and former manager of the Te Urewera Mainland Island project from 1996 to 2002, Peter Geoffrey Shaw, is concerned about biodiversity risks of destroying the remainder of the huts as well as the reduction of public access that will inevitably result. He specifically refers to the effect that removal of the huts used for accommodation of conservation staff as a base for the trapping of predators in core areas will have on endangered species, particularly the kōkako population of Te Urewera.

[23] There is a third affidavit from Peter Donald Askey, the current President of the Nga Tapuwae O Taneatua Tramping Club. He refers to the lack of any consultation prior to the decision to destroy the huts. He says the huts are a key part of their activities and trip planning. In his opinion the huts play a vital role in enabling the

Club to safely run multiday trips. He says the hut network provides an essential contingency for travel if things go wrong due to weather, illness, or injury.

[24] Finally, a solicitor, Thomas William Robert Lynskey, attaches correspondence to his affidavit from the Department of Conservation about the lack of a current operational plan.

Test for interim order

[25] In judicial review proceedings, interim orders may be made to preserve the position of an applicant. Section 15 of the Judicial Review Procedure Act 2016 provides:

> **15 Interim orders**
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> (1) At any time before the final determination of an application, the court may, on the application of a party, make an interim order of the kind specified in subsection (2) if, in its opinion, it is necessary to do so to preserve the position of the applicant.
>
> (2) The interim orders referred to in subsection (1) are interim orders—
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> (a) prohibiting a respondent from taking any further action that is, or would be, consequential on the exercise of the statutory power:
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> (b) prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application relates:
>
> (c) declaring that any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by the passing of time before the final determination of the application, continues and, where necessary, that it be deemed to have continued in force.
>
> (3) However, if the Crown is a respondent,—
>
> (a) the court may not make an order against the Crown under subsection (2)(a) or (b); but
>
> (b) the court may, instead, make an interim order—
>
> (i) declaring that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power:
>
> (ii) declaring that the Crown ought not to institute or continue any proceedings, civil or criminal, in connection with any matter to which the application relates.
>
> (4) An order under subsection (2) or (3) may—
>
> (a) be made subject to such terms and conditions as the court thinks fit; and

> (b) be expressed to continue in force until the application is finally determined or until such other date, or the happening of such other event, as the court may specify.

[26] *McGechan* states that the current approach to interim orders begins with the statutory threshold of the necessity to preserve the position of the applicant. It then applies a wide discretion which does not seek to define factors relevant to the discretion, but which requires the court to consider all of the circumstances. These circumstances include the strength or weakness of the claim, the statutory framework, the public interest, and the private and public repercussions of granting relief.[2]

[27] Necessity to preserve the applicant's position is the threshold. In this case the applicant has used the huts for recreation and to gather food since he was a child. He wishes to continue to do so. The huts are currently being systematically destroyed by fire. They will be gone by Christmas. There will therefore be nothing to preserve if an interim interim order is not now granted pending a hearing of the application for an interim order.

[28] The strength of the applicant's substantive case is usually, but not always tested by the Court. In the present case, the applicant has put forward a number of grounds for judicial review. As to the alleged breach of natural justice, the minutes of the first respondent record the abstention of one of the Board members on the basis of the need to receive endorsement from Te Waimana Kaaku Tribal. This would imply that the member was unaware that the matter would be raised at the meeting (that is, that there was inadequate notice).

[29] The applicant also refers to what he says are various breaches of the Act. I cannot really assess the merits of such claims without hearing from other parties and analysing whatever documentation they are in a position to provide.

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[2] Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [JR15.02].

[30] However, as to the lack of an operational plan for the current year, the Department of Conservation has emailed one of the deponents, Thomas William Robert Lynskey, on 3 November 2022, as follows:

> We are unable to provide a copy of the current operational plan for Te Urewera that meets the criteria you specified (a copy of any current operational plan for Te Urewera prepared under s 53 of the Te Urewera Act by the Chief Executive of TUT and the Director-General of Conservation) because, for the 2022-2023 year DOC and TUT have not worked together on a draft annual operational plan for the Board's consideration.

[31] Section 95 permits demolition of Crown improvements in a manner that is consistent with the management plan and "the annual operational plan for Te Urewera". In the absence of an annual operational plan, it is difficult to see how demolition of the huts is consistent with it.

[32] The Court will usually take a more robust attitude to assessing the degree of likelihood that an applicant will succeed in the substantive proceeding if an application for interim relief will effectively determine the proceeding. That is not the case here. Interim relief will not effectively determine the proceeding.

[33] Overall, it is my assessment that the applicant's case is not without merit.

[34] Furthermore, there is no demonstratable disadvantage to the huts remaining pending a hearing of the application for an interim order. No inconvenience to the respondents would be caused. Although an interim interim order may cause some frustration to the respondents' plans, any opposition to interim relief lacks weight.

Result

[35] In this case, standing back and asking where the overall justice lies, I am of the view that the applicant should be granted interim relief. There will accordingly be an interim interim order that the first and second respondents or their employees or contractors immediately cease their programme to demolish or remove the huts listed in the appendix to the statement of claim pending the hearing and determination of the application for an interim order. The second respondent is also to file and serve a

complete list of the huts that have been demolished or removed by 5:00 pm on Wednesday, 9 November 2022.

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Woolford J

Solicitors:	Izard Weston (TWR Lynskey), Wellington, for the Applicant Buddle Findlay (P Beverley), Wellington, for the First and Second Respondents Crown Law (J Gough), Wellington, for the Third Respondent
Counsel:	W Aldred, Wellington