IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000121
[2019] NZHC 3187

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for review
BETWEEN	AOTEAROA WATER ACTION INCORPORATED Applicant
AND	CANTERBURY REGIONAL COUNCIL First Respondent
AND	CLOUD OCEAN WATER LIMITED Second Respondent
AND	RAPAKI NATURAL RESOURCES LIMITED Third Respondent
AND	NGĀI TŪĀHURIRI RŪNANGA Non-Party

Hearing: On the papers

Counsel: P Steven QC for the Applicant
L F de Latour for the First Respondent
L I Fox for the Second Respondent
E Chapman for the Third Respondent
J M Appleyard for the Non-Party

Judgment: 5 December 2019

JUDGMENT OF NATION J

Introduction

[1] In these proceedings, Aotearoa Water Action Inc (the Group) challenges, by way of judicial review, the decisions made by the first respondent (ECan) to grant consents to the second and third respondents to take and use water from an aquifer for the purposes of bottling it for commercial resale. On 16 August 2019, the proceedings were set down for hearing scheduled for 9 and 10 December 2019.

[2] Ngāi Tūāhuriri Rūnanga (the Rūnanga) filed an application for leave to intervene in the proceedings and present legal submissions on 9 September 2019. The application was made on the basis the Rūnanga would seek to provide a Ngāi Tūāhuriri Rūnanga perspective on issues in the proceedings. The application is opposed by the second and third respondents.

The Rūnanga's substantive submissions

[3] The Rūnanga has filed the synopsis of submissions and an affidavit from Dr Rawiri Te Maire Tau that it seeks to present at the hearing. The submissions assert the Rūnanga's legal status and role as mana whenua affected by ECan's decisions challenged in these proceedings. The Rūnanga submits that ECan failed to have regard to the Rūnanga's interests and the directions in the statutory and regulatory framework as to cultural values and, in particular, that ECan did not understand or consider certain and clear adverse cultural effects of the decisions. In his affidavit, Dr Tau explains the Rūnanga's relationship with water in all its interconnected forms is of immense importance to Ngāi Tūāhuriri as taonga.

[4] The Rūnanga therefore seeks to intervene in the proceedings on the following issues:

(a) The extent to which ECan correctly determined that the 'change of use' and amalgamation applications could proceed and be granted on a non-notified basis; and

(b) Within the above:

    (i) ECan's approach to assessing effects on cultural values/the Rūnanga; and

(ii) the application of s 6(e) of the Resource Management Act 1991 (RMA), which mandates that all persons exercising functions and powers under that Act shall recognise and provide for the relationship of Māori and their culture and traditions with water as a matter of national importance.

Principles on intervention in judicial review proceedings

[5] The Rūnanga seeks to be added as an intervener, not a plaintiff. The difference is significant, as an intervener has no right to appeal.[1] As one commentator puts it, interveners "may assist the court in proceedings raising questions of public interest or otherwise likely to have significant precedent effects".[2] In recent times, applications to intervene have been granted in judicial review cases considering, among other issues, voluntary euthanasia, teaching Christianity in public schools, and decisions made by the Minister under the Canterbury Earthquake Recovery Act 2011.

[6] As stated in *Seales v Attorney-General*:[3]

> There is no specific legislative basis for intervention in New Zealand although it is accepted that r 7.43A(d) and (e) of the High Court Rules and the High Court's inherent jurisdiction enable the High Court to grant leave to a non-party to intervene.

[7] As a general rule, interveners have no right to be heard orally unless further leave is given,[4] and will bear their own costs.[5]

[8] In *McClintock v Attorney-General*, Thomas J set out the principles of intervention as follows:[6]

---

1 *Beneficial Owners of Whangaruru Whakaturia No 4 v Warin* [2009] NZCA 60, [2009] NZAR 523 at [27]. See also *McClintock v Attorney-General* [2015] NZHC 1280 at [30] and *Fundacion Pimjo Asociacion Civil v Aguilar & Aguilar Ltd* [2014] NZHC 2322 at [43].

2 Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 1011.

3 *Seales v Attorney-General* [2015] NZHC 828 at [41].

4 See, for example, *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2012] NZHC 1177 at [26(f)].

5 See, for example, *Earthquake Commission v Insurance Council of New Zealand Inc* [2015] NZHC 457, (2015) 22 PRNZ 427 at [7].

6 *McClintock v Attorney-General*, above n 1. See also other expressions of the principles in *Seales v Attorney-General*, above n 3, at [45]-[48], *Bartle Group Ltd v New Zealand Transport Agency* [2019] NZHC 2168 at [10], and *Capital and Merchant Finance Ltd v Perpetual Trust Ltd* [2014] NZHC 3205 at [41].

> [44] The following propositions can be distilled from the authorities on the joinder of interveners/interested parties:
>
> (a) An applicant must show that its legal rights or liabilities in relation to the subject matter will be directly affected. Commercial, financial, or reputational interests in the outcome will only be sufficient in exceptional circumstances.
>
> (b) If the intending intervener's presence before the Court will not improve the quality of information before the Court, that will count heavily against its addition to the proceedings.
>
> (c) A relevant consideration is the extent to which the proposed intervener can rely on one of the parties to protect its rights and obligations.
>
> (d) If either party would be prejudiced by the intervention, or if the intervention would create an impression of partiality, the application will likely not be granted.
>
> (e) In cases where development of the law is possible, the application is more likely to be granted if the proposed intervener has special expertise to assist the Court on wider public policy issues.
>
> (f) The underlying issue is whether it would be unjust to adjudicate on the matter in dispute without the intervener being heard. Several of the factors mentioned above tie into this issue.
>
> (g) Where intervention is justified, the degree of participation granted to the intervener should be the minimum necessary to protect the intervener's interests.
>
> (h) The power to grant leave to intervene is discretionary and should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing the costs of the litigation.

[9] It is noted that, unlike the wording of the proposition at (a) above, a full High Court in *Wilson v Attorney-General* stated that interveners may be "directly or indirectly affected by the judicial review application".[7]

Positions of the parties on intervention

The Rūnanga

[10] The Rūnanga submits that as mana whenua it is directly affected by the decisions challenged in these proceedings. It submits that ECan was mistaken about the law, had regard to irrelevant considerations and failed to have regard to relevant considerations. It submits that ECan never properly turned its mind to the wider social,

---

7 *Wilson v Attorney-General* [2010] NZAR 509 (HC) at [20].

economic and (importantly) cultural effects that arose from the granting of the consents. The Rūnanga considers that ECan has acted in a way that is inconsistent with its existing legal rights and it has deprived the Rūnanga of the opportunity to properly put its concerns around cultural effects to the decision makers. It submits the proceedings raise important issues regarding ECan's approach to water bottling applications and the assessment of cultural effects in this context. The Court's determination of the issues under review will, it submits, inevitably affect the rights and interests of the Rūnanga.

[11] The Rūnanga wishes to provide its perspective on the issues before the Court, based on their own unique experiences and current position in relation to the cultural effects of water bottling, and the assessment thereof. Those arguments, the Rūnanga submits, would allow the Court to consider the issues arising from the specific dispute before it more fully.

[12] The Rūnanga asserts the public importance of the issues raised in the proceeding, particularly in terms of how similar applications will be determined in future. This raises issues of broad significance, including for Māori, and it submits that a broad and liberal approach to intervention on matters of such significance is appropriate.

[13] The Rūnanga submits that its substantive submissions will assist the Court. While the applicant's submissions address the general issues of process for decisions under review, it submits the perspective of the Rūnanga, from its unique tangata whenua position, will not otherwise be available to the Court. No other group or organisation is able to comment on such cultural matters. The Rūnanga has particular expertise on the issue of the cultural effects of the decision on waters.

[14] The Rūnanga is conscious of the need to avoid the risk of expanding the issues, elongating the hearing or increasing the costs of litigation, as well as to avoid prejudice to the parties. It seeks limited participation rights only, consistent with its interest in the proceeding. Noting the concerns of the second and third respondent, the Rūnanga submits that the timing of its application to intervene was in part informed by discussions with counsel and representatives for the applicant, the release of a Waitangi Tribunal report bringing an increased focus on the role of iwi in RMA

decision making,[8] and evidence being arranged to enable the Rūnanga's participation. The Rūnanga notes that no party suggested the existing timetabling would need to be amended. The Rūnanga has voluntarily provided its substantive submissions in advance, in order to provide the other parties with reasonable notice of its arguments and avoid any risk of prejudice.

[15] The Rūnanga seeks to present submissions orally at the hearing but proposes that the presiding Judge can ensure the oral submissions do not exceed a reasonable amount of time.

[16] In summary, the Rūnanga submits that it would be unjust to adjudicate on the matter in dispute without the Rūnanga being heard as it would directly affect the Rūnanga's legal rights and no other party could be relied on to protect its rights and interests.

Aotearoa Water Action Inc as applicant

[17] The applicant is in favour of the Rūnanga being granted leave to intervene.

ECan as first respondent

[18] ECan has not filed a notice of opposition to the Rūnanga's application and will abide the decision of the Court.

Cloud Ocean Water Ltd as second respondent

[19] The second respondent (Cloud Ocean Water) opposes the Rūnanga's application.

[20] Cloud Ocean Water first submits that the Rūnanga's delay in filing the application until 9 September 2019 is relevant to its merits. It notes the Rūnanga did not reply to two emails from ECan seeking consultation in July and December 2017 about the consents ultimately granted to the second and third respondents. Counsel for the Rūnanga says it appears that email address was no longer live, but Cloud Ocean Water says that is the Rūnanga's own fault for not ensuring ECan's records were updated. Cloud Ocean Water says the present proceeding has been highly publicised

---

8 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358, 2019).

and the Rūnanga must have become aware of it before the end of 2018. It submits it is reasonable to infer that the Rūnanga made a policy decision not to intervene, but subsequently, and belatedly, changed its mind, which it submits is not a position of merit.

[21] It further submits there will be prejudice to the existing fixture and parties as the time set down for hearing was based on the time required to hear the existing parties, and the two-day fixture may not accommodate further submissions.

[22] Cloud Ocean Water expresses concern that allowing the Rūnanga to intervene would extend the scope of the issues and argument before the Court, exceeding what is properly arguable in the proceeding. It submits the Rūnanga's submissions raise issues about the Rūnanga's rights that are more political than legal.

[23] Counsel for Cloud Ocean Water also submits that the Rūnanga's real argument is as to cultural, not legal, effects, supporting this argument by counting the number of times the words "cultural" and "legal" are used in the submissions.

[24] Cloud Ocean Water submits that the principles for a judicial review of resource management decisions are well established, and the Rūnanga's presence before the Court would not improve the quality of relevant information before the Court.

[25] It further submits that any relevant interests of the Rūnanga are already protected by the Group's claim, and the Group could put before the Court any relevant and admissible evidence relating to the Rūnanga's interests.

[26] Cloud Ocean Water submits no relevant development of the law is possible as tangata whenua do not have general legal ownership rights over water, and that will not change in this proceeding.

[27] In summary, Cloud Ocean Water submits that it would not be unjust for the Court to adjudicate on the proceeding without the Rūnanga being heard for all the reasons discussed. Should the Group's claim relating to the decision not to notify the consent applications succeed, and that decision is set aside, the consent applications will be notified and the Rūnanga will then have an opportunity to be heard.

Rapaki Natural Resources Ltd as third respondent

[28] The third respondent (Rapaki) lodged a notice of opposition to the Rūnanga's application. It acknowledges that some of the factors listed relating to the timing and prolongation of the hearing have been superseded by further memoranda filed with the Court in the meantime. Notwithstanding its opposition, Rapaki will abide the decision of the Court. However, it noted its concern that the scope of the application not be widened by the Rūnanga being granted intervener status.

Analysis

[29] I propose to consider the Rūnanga's application in light of the principles espoused in *McClintock*.[9]

An applicant must show that its legal rights or liabilities in relation to the subject matter will be directly [or indirectly] affected. Commercial, financial, or reputational interests in the outcome will only be sufficient in exceptional circumstances.

[30] The RMA specifically provides that decision makers, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the relationship of Māori and their culture and traditions with water. The affidavit of Dr Tau sets out the deep connection the Rūnanga has with water in the area. The Rūnanga challenges ECan's decision on the basis that it did not properly consider the cultural effects of its decision, specifically on the Rūnanga. The Court will not however at this hearing be determining what those effects might be or what rights, if at all, the Rūnanga had in respect of that water. The Court's decision will thus not affect what, if any, legal rights the Rūnanga had in respect of the water which is the subject of these proceedings.

[31] The basis on which the Court will be considering the challenged decisions are well established:[10]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on

---

9 *McClintock v Attorney-General*, above n 1.

10 *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442; upheld on appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZCA 665, [2014] NZRMA 73.

> notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

[32] In submissions in advance of the main hearing, Ms Steven QC, for the Group submits "the gravamen of the Group's (remaining) concern is that ECan has enabled [Cloud Ocean Water] and Rapaki to use water allocated under the Existing Take Consents for commercial water bottling following a convoluted and unlawful process". In her overview of the Group's concerns, counsel submits:

> As a first ground, it is contended that ECan has followed a process not provided for under the RMA to enable a new take and use consent to be issued in circumstances where a fresh application for a take of water was a prohibited activity.

[33] In the proposed submissions for the Rūnanga, counsel, Ms Appleyard, submits "the key issue in this proceeding is the question of the Court's ability to grant a separate 'use' permit for water".

[34] In submissions for ECan, counsel submits:

> The primary matter to be determined in these judicial review proceedings is whether it was lawful for the Council to grant separate 'use' permits enabling water originally authorised to be taken and used for a wool scour and a meat processing plant to be used for commercial water bottling.

[35] The Court's determination on the key issue before it in the proceedings will thus not directly or indirectly affect the claimed rights of the Rūnanga.

[36] It is apparent from the submissions advanced for the Rūnanga and the affidavit of Dr Tau in support of the application that, as an intervener, the Rūnanga seeks to be heard so it can advise the Court of the particular importance that water has in the Kaiapoi area to the Rūnanga, and the way in which water is a taonga to the Rūnanga, the way in which it is submitted the RMA requires authorities to recognise the Rūnanga's rights and responsibilities of kaitiakitanga and guardianship over water.

[37] Whether the Rūnanga's claims in this regard are valid and are to be recognised in New Zealand law are issues of major political and legal significance. It would be unnecessarily burdensome on the other parties involved in these proceedings for issues as to that to have to be resolved in proceedings which essentially involve the way ECan categorised the rights it was dealing with and the process by which those rights came to be transferred.

[38] The rights which the Rūnanga seeks to assert in respect of the water which is at issue in these proceedings will not be affected by the determination the Court is being asked to make as to whether ECan was correct in the way it categorised and then determined the applications which were before it.

If the intending intervener's presence before the Court will not improve the quality of information before the Court, that will count heavily against its addition to the proceedings.

[39] In these proceedings, the Court may have to consider whether ECan adequately considered the effects the consented activities would have on the particular cultural interests of the Rūnanga. If that is an issue, the information provided in Dr Tau's affidavit would be of value to the Court.

A relevant consideration is the extent to which the proposed intervener can rely on one of the parties to protect its rights and obligations.

[40] I have benefitted from being able to read the submissions for the Group filed in advance of the hearing and also the submissions that would be made for the Rūnanga if they are granted leave to intervene. I consider there is considerable overlap. Detailed submissions will be advanced for the Group in support of the argument that stand-alone "use" consents should not have been granted. Similar submissions would be made for the Rūnanga. If, and to the extent, the proposed submissions augment the submissions for the Group, they could be made by counsel for the Group. They are legal submissions based on the record of how the various applications were dealt with. The submissions are not founded on evidence by way of affidavit for the Rūnanga.

[41] The Rūnanga would also criticise ECan for the way it assessed the "effects" of the changes in use, firstly, on a legal basis as to how s 104 RMA was to be applied. Those arguments could also be advanced by counsel for the Group.

[42] The Group alleges ECan failed to properly consider the effects of the proposed changes in use of the water takes. The criticism is that ECan was in error in assessing the effects only against the effects that already resulted from existing water permits and not with regard to the particular use of the water for which consents were being sought. It is apparent from the substantive submissions that have been filed for the Rūnanga that its challenge would be on the same basis.

[43] If given leave to intervene, counsel for the Rūnanga would also be submitting, based on Dr Tau's affidavit, that there were a number of adverse cultural effects associated with the use of water which were not considered by ECan, including that:

> 49.1 Ngāi Tūāhuriri Rūnanga has a responsibility to ensure that water is kept "*for us and our children after us*" and the export of water inconsistent with this;
>
> 49.2 the proposed use is inconsistent with the protection of intergenerational interests more generally; and
>
> 49.3 the "use" is in conflict with the need to protect and enhance the mauri of water.

[44] It was submitted for the Rūnanga:

> Overall, the Rūnanga is concerned that given the approach taken by the First Respondent it never properly turned its mind to the wider social, economic and (importantly) cultural effects that arose from the change in "use" – and the use of the "take" for other purposes.
>
> The Rūnanga consider that the First Respondent has acted in a way that is inconsistent with the Rūnanga's existing legal rights and it has deprived of the opportunity not properly put its concerns around cultural effects to the decision makers. In particular, the First Respondent has made the decisions under review in a way that precludes Ngāi Tūāhuriri Rūnanga from being heard on applications that have significant adverse cultural effects.

[45] Counsel would also refer to the evidence in Dr Tau's affidavit as to the cultural significance of the area to which the consents related and the importance of it as a wāhi taonga. It would be submitted for the Rūnanga that, on that basis and in terms of ECan's own policies, the impact of the proposed activities should have been taken into account in deciding whether the various applications should have been notified.

[46] Dr Tau's affidavit provides evidence as to the significant adverse cultural effects of water bottling and the importance of the area of wāhi taonga. It would be

submitted for the Rūnanga that such information would have been relevant to ECan in making decisions both as to notification and the substantive resource consent applications. It is in this respect that, as an intervener, the Rūnanga would be widening the scope of the proceedings and the basis on which the decisions of ECan were being challenged. If the Court were to permit the decisions of ECan to be challenged on this basis, it would be more appropriate for that challenge to be made by the Rūnanga with their being able to refer to the affidavit of Dr Tau.

[47] In these judicial review proceedings, the Court will not be deciding how those effects might ultimately have impacted on the decisions that were made. This argument is also not at the forefront of the challenges which both the Group and the Rūnanga would make to ECan's decisions. It also seems apparent from the record which is already before the Court that, when considering the cultural effects of the proposed activities, the various decision makers assessed those effects against what had previously been permitted without considering whether there was any particular significance in the way water was to be bottled for commercial purposes.

If either party would be prejudiced by the intervention, or if the intervention would create an impression of partiality, the application will likely not be granted.

[48] The Group seeks to argue, through the pleadings and submissions, a further alternative to the primary ground of challenge. The Group contends that, even if applications for a take had been possible, all applications ought to have been publicly notified. This is coupled with the submission that each of the new takes would have more than minor adverse effects on the environment (to use the language of the statutory test for publication notification).

[49] In its amended statement of claim, the Group provided particulars as to its alternative ground of challenge to the notification decisions. It pleaded various ways in which it claimed ECan misdirected itself in that it assessed the actual and potential effects of the applications for the purposes of ss 95A(8) or 95A(2)(a) and in terms of s 95D in determining whether the activity "will have or is likely to have adverse effects on the environment that are more than minor".

[50] None of the pleaded particulars required the parties or the Court in the judicial review proceedings to consider if and how ECan had assessed the effects on cultural values of the Rūnanga or the recognition and provision for the relationship of Māori and their culture and traditions within their ancestral lands, water, sites, waahi tapu and other taonga under s 6E RMA.

[51] The Rūnanga would, as an intervener, thus be challenging the decisions made by ECan on a ground which is outside the scope of the proceedings as currently filed.

[52] The Rūnanga would be relying on affidavit evidence from Dr Tau which includes information as to the Rūnanga's engagement in the consent process and reference to correspondence which is not included in the bundle of documents before the Court on the proceedings as they stand.

[53] The Rūnanga's involvement thus has the potential to require the Court to deal with evidential issues in ways which could well add to the complexity, length and cost of the proceedings for the existing parties.

[54] In *Diagnostic Medlab Ltd v Auckland District Health Board*, Lang J permitted the Harbour Primary Health Organisation (Harbour PHO) to join proceedings between other parties because of the commonality of contractual provisions which were at issue in the proceedings, the particular interest which the Harbour PHO had in the standard of services which were to be provided by one of the existing parties to the arrangements which were being challenged in those proceedings, and the way in which the Harbour PHO's perspective would be of value to the Court in reaching a determination as to the issues which were already before the Court.[11] The involvement of the Harbour PHO was not going to widen the scope of the proceedings in the way that will happen here if leave is granted to the Rūnanga to intervene on the basis and for the reasons advanced by the Rūnanga.

[55] I consider that all respondents would be prejudiced through the Rūnanga becoming a party as intervener through the way their involvement would extend the

---

[11] *Diagnostic Medlab Ltd v Auckland District Health Board* HC Auckland CIV-2006-404-004724, 18 October 2006.

issues which both they and the Court would have to consider. Their involvement would widen the scope of the proceedings late in the piece. However, with the Rūnanga providing its proposed submissions along with its application to intervene, this concern is tempered somewhat.

In cases where development of the law is possible, the application is more likely to be granted if the proposed intervener has special expertise to assist the Court on wider public policy issues.

[56] In the particular proceedings that are before me, the Court will be dealing with issues of process and how certain rights have been classified by ECan in considering the applications that were before it. The Court will not be deciding what rights of guardianship the Rūnanga has over water or its rights to exercise guardianship or kaitiakitanga over water. The Court will thus not be considering issues of wider public policy on which a contribution from the Rūnanga would be of considerable value and assistance to the Court.

[57] Because of the particular basis on which the Group challenges the legality of ECan's decisions, the hearing of the Group's claim does not involve issues of general and wide importance such as will lead the Court to more readily grant leave to intervene.[12] The consequences of the decisions may impact the Rūnanga, but it is the process of the decision-making challenged in this proceeding.

The underlying issue is whether it would be unjust to adjudicate on the matter in dispute without the intervener being heard. Several of the factors mentioned above tie into this issue.

[58] In his affidavit, Dr Tau said that he understood that the consents to the change of use of the rights were granted without the opportunity for the Rūnanga to comment. ECan had attempted to advise the Rūnanga of the relevant applications by an email to the address which it had on file for the Rūnanga. The consents granted have also been the subject of extensive publicity.

---

[12] *Hawke v Accident Compensation Corporation* [2014] NZCA 552 at [9(b)], with reference to *Wellington City Council v Woolworths New Zealand Ltd* [1996] 2 NZLR 436 (CA); *Drew v Attorney-General* [2001] 2 NZLR 428 (CA); *Chamberlains v Lai* [2005] NZSC 32 at [5].

[59] Mr Burge was a principal consents advisor with ECan. He was involved in the processing of the second and third respondents' applications for consents. In an affidavit sworn on 23 September 2019, he responded to a comment in Dr Tau's affidavit that the relevant consents were granted without the opportunity for the Rūnanga to comment. Mr Burge said that, in accordance with ECan's normal council procedure, ECan had advised the Rūnanga of the applications and asked them to indicate if they had any concerns and to respond by 26 July 2017. He provided other information which indicates the Rūnanga were given notice of the relevant applications and had an opportunity to make submissions.

[60] Amongst the documents is the s 42A officer's report of 21 December 2017 on an application to use water taken under an existing consent for commercial water bottling. It noted the application had been subject to extreme public scrutiny, including circulation of a petition to rescind the current take consent on the basis of climate change and public feeling.

[61] These proceedings were filed on 2 March 2018. On 2 and 3 October 2018, there was a hearing in which the Court was required to rule as to the correctness of a pleading that, even if the consents challenged by way of judicial review were invalid, prior consents authorised the taking of water.

[62] In her submissions, counsel for the Rūnanga has said the Rūnanga is concerned that the activity of "water bottling" has certain clear adverse cultural effects that were not understood or considered as a part of the relevant decision process. Despite that, the Rūnanga had not sought to be heard when, at that hearing, the Court was required to determine whether the bottling of water for export fell within the definition of industrial use for which consents had earlier been granted. The Rūnanga had not sought to be involved in the proceedings up to that point.

[63] The application for leave to intervene was thus made at a late stage in the proceedings.

[64] If the Group is successful in its challenge to the process and basis on which the Commissioner reached his decision, then the process by which the various consents

were granted will have to begin again. The Rūnanga will then have an opportunity to present information and its perspective to the relevant decision maker.

Where intervention is justified, the degree of participation granted to the intervener should be the minimum necessary to protect the intervener's interests.

The power to grant leave to intervene is discretionary and should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing the costs of the litigation.

[65] I have regard to both the above principles, the lateness of the Rūnanga's engagement in this proceeding and the time currently available for the hearing. This is a case where it is appropriate to exercise the restraint that is inherent in this principle.

[66] In its alternative ground of challenge to the notification decisions, the Group challenges the "effects assessments" undertaken at each stage of the decision-making process. In a judicial review proceeding, the Group will not be able to challenge any decision arrived at by ECan on a merits basis so neither the Group nor the Rūnanga, if granted leave to intervene, would be seeking a determination from the Court, on a merits basis, that ECan's decisions as to a potential effect was wrong.

[67] In the current proceedings, the Court will not be determining what legal rights the Rūnanga had as to the water at issue in the proceedings. The Court will not be determining whether, on the merits, the relevant decision maker came to a correct decision as to what would be the cultural effects of granting the consents sought.

Conclusion

[68] Having regard to all the above, I am granting leave to the Rūnanga to intervene and for the affidavit of Dr Tau to be put before the Court. I also allow the Rūnanga's proposed submissions, which all parties have had notice of, to be before the Court at the hearing.

[69] Allowing an intervener to give oral submissions usually requires further leave.[13] I am not prepared to grant that leave. With the Rūnanga's involvement limited in the manner provided, the Court will be informed as to the way the Rūnanga's cultural values could potentially have been affected through the process by which ECan dealt with the various applications. It will enable counsel for the Group to adopt submissions that would have been made for the Rūnanga as to the law without the risk of parties being taken by surprise or having to deal with new arguments.

[70] Allowing the Rūnanga to intervene in this way is an indulgence. It has potentially widened the scope of the proceedings. What the Court might decide as a result of that remains to be seen and must be subject to the submissions made on behalf of those who are parties to the proceedings.

[71] Because of the lateness of the application and because the Rūnanga has sought an indulgence from the Court, leave is reserved to other parties to seek costs as against the Rūnanga.

Solicitors:
P Steven QC, Barrister, Christchurch
Linwood Law, Christchurch
Wynn Williams, Christchurch
Carson Fox Law, Auckland
Duncan Cotterill, Christchurch
Chapman Tripp, Christchurch.

This judgment was delivered by me on 5 December 2019 at 12.30 pm
Pursuant to Rule 11.5 of the High Court Rules
Registrar / Deputy Registrar
Date: 5 December 2019

[13] See for example *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery*, above n 4.