

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2020] NZEnvC 208

IN THE MATTER of the Resource Management Act 1991
AND of an appeal under s 120 of the Act
BETWEEN TE RŪNANGA O AROWHENUA AND TE
RŪNANGA O NGĀI TAHU
(ENV-2018-CHC-175)
Appellants
AND CANTERBURY REGIONAL COUNCIL
Respondent
AND RANGITATA DIVERSION RACE
MANAGEMENT LIMITED
Applicant

Court: Environment Judge J E Borthwick
(Sitting alone under s 279 of the Act)

Hearing: at Christchurch on 9 December 2020

Appearances: J G A Winchester and S K Lennon for the appellants
M C Dysart for the Canterbury Regional Council
V Hamm for the applicant
W Jennings for the Royal Forest and Bird Protection Society of
New Zealand Inc

Date of Decision: 14 December 2020
Date of Issue: 14 December 2020

DECISION OF THE ENVIRONMENT COURT



A: By consent, the application for early commencement in relation to the water permit CRC 182631 is granted. No order is made in relation to the balance of the resource consents, as pursuant to s 116(1) of the Resource Management Act 1991 these have already commenced.

REASONS

Introduction

[1] Rangitata Diversion Race Management Ltd holds resource consents for multiple activities associated with the Rangitata Diversion Race. The current race fish screen is ineffective, and resource consent has been granted for its replacement. The application for the replacement fish screen was sought as part of a wider proposal pertaining to the proposed Klondyke Storage Facility. The decision to grant the resource consents is subject to three appeals to this court.¹

[2] Rangitata Diversion Race Management Ltd (Rangitata) filed an urgent application for early commencement of all but one of the resource consent applications granted.² The need for urgency arises because Rangitata intends on entering a contract for the construction of the replacement fish screen by 11 December 2020. This date is important if the successful contractor is to complete the works before the start of the September 2021 irrigation season.

[3] The commencement application is not limited to the fish screen consent. The application is for early commencement of all but one of the consents³ granted. The single consent not included in the commencement application is for a water permit⁴ authorising the taking of water in high flood flows. This permit is the subject matter of two appeals filed by Te Rūnanga o Arowhenua and Te Rūnanga o Ngāi Tahu (Ngā Rūnanga) and secondly, Paul Hodgson and others.

Position of the parties to the appeals

[4] No party to Ngā Rūnanga's appeal opposed the making of the orders.⁵

¹ ENV-2018-CHC-174 (Rangitata), 175 (Ngā Rūnanga) and 176 (Hodgson & ors).

² Application for interlocutory order dated 26 November 2020 and affidavit in support of T R McCormick.

³ The meaning of 'resource consent application' is addressed elsewhere in the decision.

⁴ CRC 170654.

⁵ Canterbury Regional Council memorandum dated 27 November 2020.



[5] On the basis that they agree to abide the court's decision, leave to be excused from attending the hearing was granted to four parties.⁶

[6] I set the application down for a hearing because I was concerned that Ngā Rūnanga may be prejudiced if the orders were made.⁷

The law

[7] Section 116(1) of the Resource Management Act 1991 states:

- (1) Except as provided in subsections (1A), (2), (4), and (5), or sections 116A and 116B, every resource consent that has been granted commences—
- (a) when the time for lodging appeals against the grant of the consent expires and no appeals have been lodged; or
 - (b) when the Environment Court determines the appeals or all appellants withdraw their appeals—
- unless the resource consent states a later date or a determination of the Environment Court states otherwise.

[8] In *Golden Bay Marine Farmers Consortium v Tasman District Council*⁸ the High Court held a determination under s 116 involves the exercise of a discretionary judgment, the section is not merely a procedural power. Relevant to the discretionary judgment is the issue of whether granting the application would prejudice consideration of the appeal or disadvantage public and/or private interests. The tests were restated in *Walker v Manukau City Council*,⁹ and applied since by other divisions of the Environment Court, as follows:

- (a) whether allowing the consent to commence pending an appeal will serve the purpose of the Act; and
- (b) whether prejudice arises from either allowing or disallowing the consent to commence.

⁶ Central South Island Fish and Game, Ashburton Lyndhurst Irrigation Ltd, MHV Water Ltd and Paul Hodgson & ors.

⁷ Registry emails (2) dated 30 November 2020 and Minute dated 30 November 2020.

⁸ *Golden Bay Marine Farmers Consortium v Tasman District Council* (2007) 7 ELRNZ 31 (HC).

⁹ C106/99.



[9] The court can authorise a limited exercise of a consent, which is still subject to appeal, provided those parts of the consent that commence do not go to the core of the matter to be determined by the court; per *NCI Packaging (NZ) Limited v Auckland Council*.¹⁰

[10] By far the majority of early commencement applications involve appeals against the conditions (only) of a resource consent. There are very few Environment Court decisions granting early commencement where the decision granting or refusing resource consent is on appeal. In relation to the latter, each case has tended to be decided on its own facts; per *Kawarau Jet Services Holdings Limited & Anor v Queenstown Lakes District Council & Anor*.¹¹

Potential for prejudice

[11] When seeking orders, Rangitata contends all but one of the resource consents granted have commenced under s 116(1) of the Act, but if there is any doubt about the matter then commencement orders are sought.¹²

[12] As noted, Ngā Rūnanga appealed, in part, the decision of the Regional Council to grant consent for the water permit authorising the taking of 10 cumecs of water from the Rangitata River during flood flows (CRC 170654). The related decision on the use of water (CRC 182631) was not appealed by Ngā Rūnanga.

[13] While the taking and use of water is a restricted discretionary activity under the relevant rule,¹³ the consent authorities bundled these activities together with the other activities in relation to which resource consent applications were filed and assessed them as if they were non-complying activities; this being the most restrictive activity class of all the matters for which consents were required. Rangitata submits that because the permit for the taking of water is the only matter on appeal that it is artificial to maintain the 'bundling' and that the water permit should now be considered as a restricted

¹⁰ *NCI Packaging (NZ) Limited v Auckland Council* [2013] NZEnvC 40 at [7]-[8].

¹¹ *Kawarau Jet Services Holdings Limited & Anor v Queenstown Lakes District Council & Anor* [2010] NZRMA 434 at [22].

¹² Rangitata Diversion Race Management Ltd submissions dated 7 December 2020 at [8]; the related Hodgson proceeding appealed all 22 consents to this court, but the 21 consents subject to the early commencement application have since been resolved by way of partial consent order.

¹³ Operative and Proposed Regional Plans.



discretionary activity.¹⁴ It contends ‘bundling’ of activities no longer applies when consents granted for the same that have commenced under s 116(1) of the Act.¹⁵

[14] Rangitata filed this application because I had indicated in an earlier Minute that I was not yet persuaded as to the correctness of its position in relation to s 116(1).¹⁶ I made this observation on a related matter that the court has been asked to determine; namely the status of the activity on appeal. When considering activity status, the parties’ position on the centrality of the permit to take water within the wider proposal, differed. The proposal for the Klondyke Storage Facility was briefly described by Rangitata as having three component parts; a fish screen, a storage pond and the taking of water in flood flow conditions. Rangitata submits that, save in relation to the permit on appeal, the consents granted have commenced.¹⁷ Forest and Bird said “some” consents granted were beyond appeal and likewise the Regional Council said “some” consents could be exercised independently of the high flood flow consent, specifically mentioning the fish screens and earthwork consents.¹⁸ I had noted the consent authorities in their joint decision described the applications for resource consent as being “inextricably linked”,¹⁹ which was a view also held by Ngā Rūnanga, Forest and Bird and the Regional Council.²⁰ It was in this context that I observed Rangitata had not satisfied me that the resource consents had commenced.

[15] The determination of the status of the activity on appeal is by way of a preliminary legal issue and was to be done on the papers filed. However, the arguments on status were novel and complex and, having indicated a view in a Minute,²¹ the court directed the parties to provide further submissions and/or evidence in support of their respective positions.²² Despite an enlargement of those directions,²³ no progress has been made by the parties on setting down the preliminary legal issue for hearing. On 27 November 2020 the parties requested the directions be vacated pending the determination of the application for early commencement.

¹⁴ Rangitata Diversion Race Management Ltd submissions dated 7 December 2020 at [11].

¹⁵ Rangitata Diversion Race Management Ltd submissions dated 7 December 2020 at [25].

¹⁶ Minute dated 9 October 2020.

¹⁷ Rangitata Diversion Race Management Ltd submissions dated 21 February 2020 at [3].

¹⁸ Fish screens and earthworks are given as an example in the Regional Council’s submissions dated 21 February 2020 at [46].

¹⁹ Decision of the Hearing Commissioners dated 6 July 2018 at [10.2]-[10.5].

²⁰ Canterbury Regional Council submissions dated 21 February 2020 at [3], [32], [42] and [43]; Ngā Rūnanga submissions dated 21 February 2020 at [53] and Forest and Bird submissions dated 21 February at [36]-[37].

²¹ Minute dated 9 October 2020.

²² Minute dated 9 October 2020.

²³ Minutes dated 21 October 2020 and Registry email dated 11 November 2020.



[16] Returning to the matter of prejudice, Ngā Rūnanga is concerned that if the water permit is assessed as a restricted discretionary activity, they may not be able to prosecute their appeal as the matters of discretion would arguably preclude consideration of the reasons for the appeal and consideration also of the National Policy Statement for Freshwater Management 2020. While Rangitata takes a strong position on the status of the activity on appeal, evidently it has yet to give the matter of prejudice its full attention.²⁴

[17] The challenge faced by parties in relation to the preliminary legal issue is not over the narrowing of the issues on appeal to a single permit. Rather, it is whether the appealed permit is to be ‘unbundled’ from the proposal and considered now as a restricted discretionary activity? Rangitata’s view is that the consent on appeal became ‘unbundled’ when the balance of the consents commenced under s 116(1), but that if this was not the case orders under s 116(1) are sought.

[18] Ordinarily, I would be hesitant to make any orders or determination on appealed consents that are inter-linked. Rangitata acknowledged the court’s practice when earlier it applied for partial consent orders in relation to the Hodgson appeal, that the application remain on hold pending the outcome of other related appeals.²⁵

[19] Matters have moved on since the court released its 9 October 2020 Minute. Firstly, Rangitata now makes clear that the commencement orders can be made without prejudice to Ngā Rūnanga’s position on activity status, which – unless otherwise agreed between the parties – still requires determination by the court as a preliminary legal issue.²⁶ Secondly, Rangitata acknowledges that in many cases where there are multiple resource consents granted and only some appealed, a proposal could not be implemented if the proponent does not have all necessary consents in place. Further, the refusal of one consent that is essential to a proposal will likely result in the decline of all consents required for the proposal. In this case, however, Rangitata holds existing resource consents to take and use approximately 30 cumecs of water, the permit to take an additional 10 cumecs in flood flow conditions is not required to implement the other consents granted (i.e. the 10 cumec take is not core to the fish screen or storage pond

²⁴ Transcript (Hamm) at 49.

²⁵ Memorandum of counsel seeking telephone conference dated 15 March 2019 at [16].

²⁶ Rangitata Diversion Race Management Ltd submissions dated 7 December 2020 at [11].



proposals).²⁷ The other parties accept Rangitata's submission, as do I, save in relation to the related permit to use water (CRC 182631).

[20] In the past, the Regional Council has granted a single permit to take and use water and these activities are the subject matter of a single rule in the Regional Plan.²⁸ Rangitata submits because the decision on the permit is not in issue on appeal, therefore the permit to use water has commenced. For the reasons I set out in the October 2020 Minute, I am not so certain.

[21] In *Marlborough District Council v Zindia Ltd*,²⁹ the High Court distinguished between the 'activity' and the 'resource consent application' which may be for multiple activities, including multiple classes of activity. The High Court found that where an application proposes multiple activities, the consent authority will determine whether it is appropriate to grant or refuse the application; not necessarily whether it is appropriate to allow any one of the individual activities to occur.³⁰ In this case, the relevant resource consent application here was for two activities, the taking of water and the use of water, and these activities are inter-linked. While part of the decision on the resource consent application was appealed I am yet to be persuaded by Rangitata that the 'resource consent' for the use of water has commenced. This is not a matter that I need to make a determination on as all parties consent to the making of a commencement order which I will do, limited to the permit to use water.

Outcome

[22] By consent, I will grant the application for early commencement in relation to the water permit CRC 182631, such an order being by consent, rather than representing a decision or determination. The court understands for present purposes:

- (a) no party to the proceeding opposes the order being made; and
- (b) all parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction and conform to the relevant requirements and objectives of the RMA including, in particular, Part 2.

²⁷ Rangitata Diversion Race Management Ltd submissions dated 7 December 2020 at [18]-[23].

²⁸ Rule 5.123 of the operative and proposed Regional Plan.

²⁹ *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765.

³⁰ *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765.



[23] I decline to make the orders in relation to the balance of the resource consents,³¹ as I find these have already commenced.

Directions

[24] I reserve costs on the application for commencement orders. Any application for costs is to be filed by **Friday 15 January 2021** and any reply filed by **Friday 22 January 2021**. In the event no application for costs is made, the court's order will be (without further decision of the court issuing) that there is no order as to costs.

[25] I further direct by **Friday 29 January 2021**, the parties to the Ngā Rūnanga appeal (ENV-2018-CHC-175) are to file a joint memorandum advising:

- (1) whether the reasons for the appeal can be considered by the court under Rule 5.123 of the proposed and operative Regional Plans;
- (2) the relevance of the National Policy Statement for Freshwater Policy 2020 to any matter in issue on appeal; and
- (3) if a hearing is still required for the preliminary legal issue, parties are to propose a submissions timetable. If a hearing is not required and agreement has been reached parties are to advise as such.

Jane 3



J E Borthwick
Environment Judge

³¹ CRC 170651, CRC 170652, CRC 170653, CRC 170655, CRC 170656, CRC 170657, CRC 170659, CRC 170660, CRC 170662, CRC 182535, CRC 182536, CRC 182537, CRC 182538, CRC 182539, CRC 182540, CRC 182541, CRC 182542, CRC 184147, LUC 16/0067, LUC 17/0122.