IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-556
[2022] NZHC 2389

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for judicial review and an application for a declaration
BETWEEN	NEW HEALTH NEW ZEALAND INC Applicant
AND	WELLINGTON WATER LTD First Respondent
	WELLINGTON CITY COUNCIL Second Respondent
	HUTT CITY COUNCIL Third Respondent

Hearing:	13 September 2022
Appearances:	T Mijatov and J S Trevella for the Applicant A S Butler for the Respondents
Judgment:	16 September 2022

JUDGMENT OF COOKE J
(Declining interim relief)

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[1] By application dated 30 August 2022 the applicant seeks interim orders under s 15 of the Judicial Review Procedure Act 2016 prohibiting the reintroduction of fluoride into Wellington's drinking water supply until further order of the Court.

[2] The application is supported by four affidavits, one from the Chairman of the applicant, and three affidavits providing expert evidence. The application is opposed

by the respondent who has filed nine affidavits relating to the circumstances under which fluoridation has occurred in the wider Wellington region.

[3] The application was first referred to me as Duty Judge on 2 September and after hearing from counsel I directed a hearing before me on 13 September.

Background

[4] The applicant has a well-established track record of challenging decisions to introduce fluoride into New Zealand's drinking water supplies. It unsuccessfully challenged such decisions in 2013–2018 before the High Court,[1] the Court of Appeal,[2] and the Supreme Court.[3]

[5] In these proceedings it now challenges the legality of the fluoridation of the Wellington region water supplies. The water in the Wellington region has been fluoridated since the 1960s. The relevant decision-makers named in the proceedings are the second and third respondents — the Wellington City Council and the Hutt City Council. The first respondent, Wellington Water Ltd (Wellington Water), is a company owned by a number of local authorities in the wider region. It manages drinking water supply issues operationally.

[6] In May and November 2021 Wellington Water stopped fluoridating the water at two of its four water treatment plants — Te Marua and Gear Island. This was due to what can be described as operational issues surrounding the equipment and resources, including health and safety issues. Wellington Water did not tell the relevant councils that it had done this until March 2022. When they became aware of this the councils were concerned and they have required full fluoridation be promptly restored. An independent inquiry was commissioned into the circumstances, with the results reported in June 2022.

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1 *New Health New Zealand Inc v South Taranaki District Council* [2014] NZHC 395, [2014] 2 NZLR 834.

2 *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13.

3 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948.

[7] Significant work has been undertaken by Wellington Water to restore the ability of these two plants to deliver fluoridation in accordance with the councils' policies. There is a commissioning process that is currently being completed following the upgrade and repair works. The Te Marua plant commenced commissioning in the last week of July 2022 and moved into a phase involving fluoridation at full levels on 27 August, with the commissioning period scheduled to finish at around 24 September. After moving to this phase the fluoridation levels have been within the targeted range for delivering optimally fluoridated water. The Gear Island commissioning has been more complex, but it is expected that it will move to a phase involving fully fluoridated water about now.

[8] These two facilities are only two of the plants that deliver fluoridated drinking water to the Wellington and Hutt region. The Te Marua plant is in Upper Hutt, and the Waterloo, Wainuiomata and Gear Island plants are in Lower Hutt. They form part of an integrated network that serves the region overall, including not only Wellington and the Hutt but also Porirua.

[9] The application for interim relief proceeds on the basis that orders should now be made to prevent the reintroduction of fluoride into the Wellington region's water supply until further order, and particularly until the applicant's new judicial review challenge is heard and determined.

Approach to interim relief

[10] The approach the Court adopts to an application for interim relief under s 15 of the Judicial Review Procedure Act is well established. It was described by the Supreme Court in *Minister of Fisheries v Antons Trawling Company Ltd* in the following terms:[4]

> Before a Court can make an interim order … it must be satisfied that the order sought is reasonably necessary to preserve the position of the applicant. If that condition is satisfied the Court has a wide discretion to consider all the circumstances of the case, including the apparent strengths or weaknesses of

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4 *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101; (2007) 18 PRNZ 754 at [3]..

> the applicant's claim for review, and all the repercussions, public and private, of granting interim relief.[5]

The present case

[11] A number of matters were referred to in the comprehensive submissions of the applicant and the respondents. I do not intend to address all the matters that have been raised, however. That is because there are three inter-related reasons why interim relief is clearly not appropriate in this case.

New Health's challenge already substantively addressed

[12] The first point is that the applicant's challenge to the legality of the fluoridation of water supplies has already been substantively addressed in its earlier judicial review challenge that proceeded unsuccessfully through to the Supreme Court. That judicial review challenge involved comprehensive arguments advanced by the applicant that the fluoridation of water supplies was unlawful because it was not authorised by statutory provisions, and involved a breach of the right to refuse to undergo medical treatment contrary to s 11 of the New Zealand Bill of Rights Act 1990 (NZBORA). It involved extensive expert evidence on the underlying issues. In short the applicant's challenge has already been substantially heard and determined. I accept that this does not prevent the ability to mount a new challenge contending that there have been significant developments concerning fluoridation that now mean its challenge should be successful. But on the basis of the evidence that has been filed I do not apprehend there is a strong case to say that there have been such substantial developments. It seems to me to involve further information directed to the same issues.

[13] Mr Mijatov and Mr Trevella argued that the judgment of the Supreme Court in *New Health New Zealand Inc v South Taranaki District Council* was not authority for the proposition that fluoridation involved a demonstrably justified limit on the s 11 right, at least in relation to the water supplies in the Wellington region.[6] But despite the different opinions in the judgments of the Supreme Court, the ultimate conclusion

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5 *Carlton & United Breweries v Minister of Customs* [1986] 1 NZLR 423 at p 430 per Cooke J.
6 *New Health New Zealand Inc v South Taranaki District Council*, above n 3.

of the majority is clear and is summarised at [145] of the reasons.[7] In short, the majority concluded that the decision to fluoridate was empowered by legislation, and that the right in s 11 did not constrain the exercise of that power. The last part of that conclusion involved different reasoning by the majority — O'Regan and Ellen France JJ concluded that fluoridation was a justified limit on the s 11 right in accordance with s 5 of the NZBORA, and William Young J concluded that s 11 was not engaged at all. But the key point is that the Court has concluded that such fluoridation of drinking water is lawful after a full consideration of the applicant's arguments and evidence on all issues.

[14] The applicant argued that the conclusions of the Court related only to fluoridation being within the powers of territorial authorities, but did not extend to any conclusions about the exercise of such powers. I do not agree. The conclusion that the power was not "constrained" by s 11 is a conclusion concerning the exercise of the power challenged in that case. It is a conclusion that fluoridation is lawful notwithstanding the right in s 11.

[15] It remains open for the applicant to argue that there have been new developments that mean that its new challenge should now be decided differently. This could include arguments that the local conditions in the Wellington region are sufficiently different to warrant a different conclusion. But these arguments proceed from a difficult starting point, particularly given the reference in the Supreme Court judgments (as well as the judgments of the lower courts) to the conclusions that have been reached by the World Health Organisation and in a number of comparable jurisdictions that the fluoridation of drinking water is justified.[8]

Legislative reform

[16] The second related issue is that, following the decision of the Supreme Court, the position has been further considered by Parliament and new legislation has been passed. The Health (Fluoridation of Drinking Water) Amendment Act 2021 amended

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7 See also *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 70 at footnote 4 — "By a majority, albeit for different reasons, the Court concluded that although s 11 is engaged the statutory power to fluoridate is not constrained by s 11 of the Bill of Rights".

8 *New Health New Zealand Inc v South Taranaki District Council*, above n 3, at [121].

the Health Act 1956. It came into effect in December 2021. There are three key elements of the amending legislation. First, local authorities who have been fluoridating their water are required to continue with that fluoridation. Secondly, local authorities who have not been fluoridating are given a power to fluoridate. Thirdly, the Director-General of Health is given power to direct local authorities to add, or not add fluoride to drinking water.

[17] As indicated the Wellington region water supplies have been fluoridated by the local authorities since the 1960s. The duty of such a local authority to continue with fluoridation would accordingly seem to arise under the new legislation. That duty is formulated by Schedule 1AA of the Health (Fluoridation of Drinking Water) Amendment Act in the following terms:

Part 1

Provisions relating to Health (Fluoridation of Drinking Water) Amendment Act 2021

1 Local authority must continue to add fluoride to drinking water

(1) This clause applies to a local authority that, before this clause commences, adds fluoride to drinking water supplied through its local authority supply.

(2) The local authority must continue to add fluoride to the water unless directed not to by the Director-General.

(3) A local authority that contravenes or permits the contravention of subclause (2) commits an offence and is liable to the same penalty as if it had contravened or permitted the contravention of section 116I.

(4) Subpart 2 of Part 5A applies to an offence against subclause (3) as if it were an offence against section 116J.

2 Local authority may add fluoride to drinking water in absence of direction

(1) This clause applies to a local authority that,—

(a) before this clause commences, does not add fluoride to drinking water supplied through its local authority supply; and

(b) has never received a direction to add fluoride or not to add fluoride to drinking water supplied through its local authority supply.

> (2) The local authority may, at its discretion, add fluoride to drinking water supplied through its local authority supply.

[18] The applicant argued that the duty in cl 1(2) does not apply here. That is because the level of fluoridation in Wellington water supplies have been beneath the recommended levels for a period of time, then leading to the cessation of fluoridation at the two plants I describe above. It was argued that any fluoridation that was not at the levels that would have the claimed health benefits, and that a territorial authority who introduced fluoride at such sub-optimal levels could not be said to have added fluoride to drinking water within the meaning of cl 1(1).

[19] I do not accept these arguments. The clauses are clear on their face, particularly when given a purposive interpretation. They came into effect 28 days after the legislation received Royal assent on 15 November 2021.[9] It is true that in mid-December 2021 at two of the treatment plants for the region, Wellington Water was not adding fluoride to the drinking water because of equipment and operational failures. But fluoride was still being added at the other two plants. This was done in accordance with the previous decisions that had been made by the Wellington and Hutt councils. For that reason it seems to me that both councils have a duty to continue with fluoridation. I do not accept that the word "adds fluoride" only mean "adds fluoride at optimal levels". Such an interpretation would mean that any local authorities that had failed to implement their decisions effectively would have no duty to continue with fluoridation at all. That is inconsistent with the purpose of the provisions. The duty is concerned with the fact of fluoridation, not the precise level at which it was added. The purpose of cl 1 is to prevent local authorities discontinuing with fluoridation. Yet that is precisely what the applicant seeks to achieve by this judicial review proceeding.

[20] It is also unrealistic to say that the Hutt and Wellington City Council properly fall into cl 2, and that they have made fresh decisions under cl 2(2) of Schedule 1AA when insisting that Wellington Water restore proper service. Clause 1 of the provisions more likely applies given its text, and in light of its purpose. It would not be appropriate for the Court to make interim orders that appear to be contrary to

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9 Health (Fluoridation of Drinking Water) Amendment Act 2021, s 2.

Parliament's legislation, even on an interim basis, absent truly compelling circumstances.

[21] Mr Mijatov and Mr Trevella sought to argue that the potential effect of this legislation actually provided a reason for the grant of interim relief. If interim relief was not granted, they argued, then there was a risk that the respondents would be able to rely on these provisions. But given that the duty under cl 1 arises at the date the legislation came into effect in December 2021 any interim orders granted by the Court could not affect whether the duty existed. The duty either applied, or it did not. Interim orders would not affect that question.

[22] It seems to me that the existence of this legislation is fatal to the application. It may not eliminate the jurisdiction to make orders under s 15 as they would only be interim orders to preserve a position until full argument at trial. But the fact that Parliament has formulated a duty on local authorities to continue with fluoridation, and that duly appears to apply, is a very strong reason why interim orders should not be granted.

Position to preserve

[23] The final factor is that, in any event, I do not accept that the applicant has a sufficiently strong position to preserve to warrant interim relief.

[24] The test for interim relief involves a threshold question — that the order is reasonably necessary to preserve the position of the applicant. A number of recent decisions have held that a liberal approach should be taken to the threshold question. It is not limited to preserving the status quo.[10] It can include putting the applicant in the position that it would have been but for the claimed illegality.[11] It seems to me that one of the reasons why a liberal interpretation of the threshold requirement is appropriate is that it allows the Court to retain jurisdiction to grant interim orders in all appropriate cases. But the strength of the position the applicant seeks to preserve

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10 *Kōkako Lodge Trust v Auckland Regional Public Health Service* [2022] NZHC 2280 at [13]; *Nga Kaitiaki Tuku Iho Medical Action Society Inc v Minister of Health* [2021] NZHC 1107 at [52]–[54].

11 *Christiansen v Director-General of Health* [2020] NZHC 887, [2020] 2 NZLR 566 at [58].

will nevertheless become highly relevant when it comes to deciding whether to grant such orders.

[25] The difficulty for the applicant here is that, whilst there has been a period of time when fluoridated water supplies have been compromised for operational reasons, the operational deficiencies have now largely been addressed, and fluoridated water supply has all but been fully restored. I accept that the applicant satisfies the jurisdictional threshold — it can say that it is seeking to preserve a position until the challenge is heard. Fluoridated water supplies have not yet been fully restored. But notwithstanding that the threshold is met, there are no compelling reasons justifying an interim order being made to preserve that position until that challenge is heard.

[26] Wellington water has been fluoridated since the 1960s. There has been no decision by the Council not to fluoridate — the present circumstances simply arise from operational failings. The applicant does not put forward an argument that fluoridation will cause any irretrievable harm to any persons in the meantime. Neither is its ability to obtain effective relief compromised. If its claim were successful the Court can still declare that such fluoridation was unlawful. Moreover there would be material public disruption if the Court were to order that fluoridation cease in the meantime. Indeed it is likely to lead to the same public concern that greeted the disclosure of the operational failure to maintain fluoridation.

Conclusion

[27] I do not need to address the arguments or evidence in any fuller way to conclude that the application should be dismissed.

[28] I accept that the applicant can technically say it has a position to preserve under s 15. But substantively Wellington water supplies have been fluoridated since the 1960s, and the argument that the operational failures mean that interim relief is now appropriate pending the substantive challenge is at best opportunistic, and also somewhat artificial given that full fluoridation has largely been restored. The applicant has already engaged in very extensive litigation contending that fluoridation of drinking water supplies is unjustified, and that litigation has failed in the High Court, the Court of Appeal, and the Supreme Court. Its views have been heard and

already dismissed at all levels. In any event there is now legislation that prevents local authorities from discontinuing fluoridation. Notwithstanding the arguments advanced by the applicant it seems to me that this legislation likely applies.

[29] For those reasons there is no justification for the Court to make any interim orders, and the application is dismissed.

[30] The respondents will be entitled to costs. If costs cannot be agreed I will receive a memorandum from the respondents within 10 working days (no more than five pages plus a schedule) to be responded to within 10 working days (no more than five pages plus a schedule).

Cooke J

Solicitors:
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Thorndon Chambers, Wellington for Respondent