

BEFORE THE ENVIRONMENT COURT

Decision No. C 129/2008

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of appeals under section 120 of the Act

BETWEEN

DEPARTMENT OF CONSERVATION,
NELSON-MARLBOROUGH
CONSERVANCY

(ENV-2007-CHC-162)

NEW ZEALAND AND NELSON
MARLBOROUGH FISH AND GAME
COUNCILS

(ENV-2007-CHC-166)

ORMOND AQUACULTURE LIMITED
AND NEW ZEALAND CLEARWATER
CRAYFISH (KOURA) LIMITED

(ENV-2007-CHC-167)

TRUSTPOWER LIMITED

(ENV-2007-CHC-217)

DIRECTOR-GENERAL OF
CONSERVATION NELSON-
MARLBOROUGH CONSERVANCY

(ENV-2008-CHC-218)

SAVE THE WAIRAU RIVER
INCORPORATED

(ENV-2008-CHC-222)



JET BOATING NEW ZEALAND
INCORPORATED

(ENV-2008-CHC-223)

Appellants

AND

MARLBOROUGH DISTRICT COUNCIL

Respondent

Court: Environment Judge J R Jackson (sitting alone under section 279 of
the Act)

Prehearing conference: at Blenheim on 20 November 2008

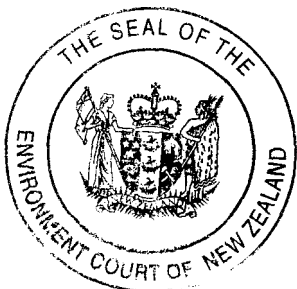
Appearances: Mr Whata and Mr Minhinnick for TrustPower Limited
Mr Hulbert for Director-General of Conservation
Mr Hardy-Jones for Jet Boating New Zealand Incorporated and
Save the Wairau Limited
Mr Downing for Ormond Aquaculture Limited, New Zealand
Clearwater Crayfish (Koura) Limited (“NZ CC(K) Ltd”), and
Ms P Doyle
Mr Gaines for Save the Wairau Limited
Ms Baker for New Zealand and Nelson Marlborough Fish and
Game Councils and Royal Forest and Bird Protection Society
of New Zealand Incorporated
Mr Clarke for Ms J McLachlan
Mr Winter for Marlborough Freshwater Anglers Incorporated
Mr Parker for himself
Ms Parr for herself and Mr Rogers

Date of Decision: 20 November 2008

Date of Issue: 26 November 2008

RECORD OF ORAL PROCEDURAL ORDERS

A: Under section 269 of the Act I ordered that the prehearing conference should proceed despite the application by the appellants in ENV-2007-CHC-167 that I should disqualify myself on grounds of conflict of interest.



B: Under section 279(1)(a) of the Act I order that the parties comply with the procedural directions in the reasons that follow.

REASONS

Introduction

[1] These appeals concern a consent decision regarding an application to build, operate and maintain a hydro-electricity scheme on the Wairau River. I held a prehearing conference on the appeals on Thursday 20 November and these are the reasons for the directions given then.

[2] A joint memorandum on behalf of counsel for TrustPower Limited and the Marlborough District Council was lodged with the Court prior to the commencement of the conference. With the exception of the next heading the remainder of the conference followed the layout of this memorandum.

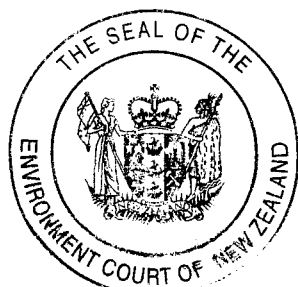
Preliminary issue - conflict of interest

[3] At the commencement of the conference I informed the persons present that I had earlier issued a memorandum about my acting 12½ or more years ago for the Royal Forest and Bird Protection Society (Marlborough) and stating that I would only be dealing with procedural matters such as timetabling. Any matters beyond this scope would be dealt with by another Environment Judge. I asked whether any party had any difficulty with my conducting the conference and then disqualifying myself from the substantive proceeding.

[4] That advice was principally for any section 274 parties who had joined the proceedings recently, since I had on 8 September 2008 issued a Memorandum to the Parties recording (relevantly):

Conflict of Interest

[2] The parties need to be aware that I have a conflict of interest in these proceedings. Many years ago (at least 12½ and I think rather more than that) I represented the Marlborough



Branch of the Royal Forest and Bird Protection Society of NZ Incorporated in lodging a submission on (I think) a change to the Branch River Hydro Scheme. Consequently, I intend to disqualify myself from hearing the substantive appeals. However, for the convenience of case management I will deal with the cases prior to a hearing unless any party objects.

[3] If any parties have issues with my suggestion about case management the Registrar should be advised in writing as soon as possible.

[5] All parties at the prehearing conference agreed to my conducting it, with one exception. Mr Downing, counsel for Ormond and NZ CC(K) Ltd objected to my conducting the conference and issuing directions. However, as I understood him his clients' objection was not absolute, they only objected to my conducting the conference if they did not like any procedural directions I gave.

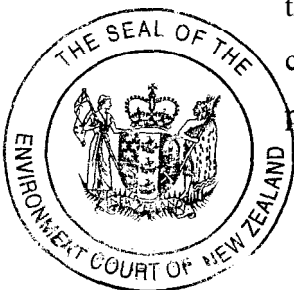
[6] Faced with making an unequivocal election Mr Downing maintained his clients' objection. He did not explain why he had not responded to the Registrar in reply to my Memorandum of 8 September 2008.

[7] I considered adjourning the proceeding on condition that all other parties' wasted costs were met by Ormond and NZ CC(K) Ltd. In the end I am persuaded by Mr Whata's argument that the public interest in favour of continuing with the conference (so that the hearing of the appeals could be expedited) outweighed any appearance of bias given that Mr Downing's clients had had over two months to object and had not taken the opportunity to do so.

[8] For those reasons I ruled that I would not disqualify myself from conducting the prehearing conference.

Further particulars

[9] In paragraph 10 of their joint memorandum counsel for TrustPower and the Council requested further particulars from the appellants. I now record my directions in the order they were applied for in that memorandum (rather than the order they were considered at the conference) so that the parties can readily relate the subjects of the particulars to the paragraphs in the relevant appeals.



[10] In view of some rather inaccurate, or at least incomplete, reporting in the Marlborough Express I should record that I have had no personal involvement with the Royal Forest and Bird Protection Society Incorporated since my resignation from it in 1996, and none with the Marlborough Branch since before that.

(a) *Identify the manner in which the [TrustPower proposal] is contrary to the specified RMA provisions ...*

[11] Under section 267(3)(a) and (c) of the RMA I directed that Ormond and NZ CC(K) Ltd lodge and serve by 13 February 2009 further particulars of the appeal ground 7(c) and in particular which parts of sections 6 to 8 of the RMA are 'offended' against.

[12] The reason for that order is the complete generality of the reasons in Appeal ENV-2007-CHC-167. They really give the other parties - and especially TrustPower - no clue as to the real issues for these appellants.

(b) *Identify the specific adverse effects alleged*

[13] I generally declined to make an order for further particulars since I consider that most of the potential alleged adverse effects on ecosystems have been sufficiently identified in one or the other appeals.

[14] However, in relation to the Ormond and NZ CC(K) Ltd appeal ground 7(a), since it is unclear from the complete generality of this appeal whether the appellants are concerned with adverse effects on their own water supply, land and/or operations or the environment generally, I directed that these parties particularise by memorandum lodged and served by 13 February 2009 any specific adverse effects on their water supply, land and/or operations which they allege will occur.

[15] Mr Downing was concerned that an order for particulars would limit the scope of the matters raised by the appeal. He is correct - that is precisely the point of defining issues. However careful pleading should allow notice to be given - especially to TrustPower - of all the relevant issues to be raised by the appellants.



(c) *Identify the specific objectives [or] policies ... [to] which the [TrustPower proposal] is claimed to be inconsistent ... or contrary ...*

[16] It was agreed between counsel that caucusing by the planning/resource management witnesses would sufficiently identify the relevant provisions in the relevant plans.

(d)-(f) *Identify the particular [areas/habitats/species] referred to*

[17] I considered these are sufficiently identified in the appeals to make further particulars unnecessary at this stage.

[18] However, I record Mr Whata's concern that a party may blindsides TrustPower by producing evidence (after TrustPower has served its evidence-in-chief) either of alleged effects on a 'new' species or of a different way of assessing the effects on a known species. I can understand TrustPower's concern but consider the issue can be dealt with in two ways. First, such evidence is unlikely to come from nowhere if it is professional and scientific, which means that any expert in caucusing will have an obligation to disclose 'new' affected species, methodologies, or data. Secondly, TrustPower could apply for leave to lodge and serve rebuttal evidence later than proposed in the agreed timetable. I imagine it would receive a sympathetic hearing.

(g) *Identify details of the amenity values referred to ...*

[19] Fish and Game identified all the amenities referred to in its appeal as being 'angling amenities' and Mr Whata was content with that.

[20] The appeals by the Director-General of Conservation and Save the Wairau also refer to amenities. They agreed to my direction that they lodge and serve further particulars of the amenities referred to by 13 February 2009.

(h) *Identify details of the specific uses referred to ...*

[21] Save the Wairau's appeal at paragraphs 8.10.1 and 8.10.2 claims that the reduced river flows from the TrustPower proposal may have impacts on use of the river.

[22] I directed that the appellant lodge and serve further particulars by 13 February 2009 as to the landowners, land, and water permits referred to.



(i) *Identify the particular data/modelling and any ... gaps*

[23] Mr Whata accepted this should be answered by caucusing between the relevant experts.

(j) *Identify the manner in which the [Commissioners'] findings are alleged to be incorrect ...*

[24] I directed that Fish and Game are to lodge particulars of this claim by Friday 27 February 2009.

(k) *Identify the particular management plans which are ... not suited to the proposal*

[25] I directed that Fish and Game and the Director-General of Conservation both lodge and serve further particulars by 13 February 2009 of the management plans referred to.

(l) *Identify the manner in which the ... permitted baseline was ... inappropriately applied*

[26] Given the legal confusion over whether there is a permitted baseline in respect of water permits, I refused to direct further particulars of any claim in respect of a baseline in respect of those.

[27] However I directed that both Fish and Game and Save the Wairau should identify the passages they rely on as establishing an incorrect baseline for any land use consents sought.

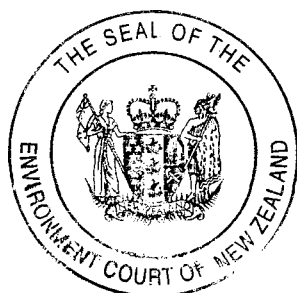
(o)-(s) *[Withdrawn]*

[28] These matters were withdrawn by Mr Whata, with no objection from Ms Radich.

McLachlan/Parr and Rogers

[29] These section 274 parties all have land over which the TrustPower canal is proposed to run. They say that in no circumstances will they sell the right to go over their land to TrustPower so that the application and appeal are a waste of time.

[30] I directed that:



- (a) the parties must confer over a statement of issues raised by the reluctant landowners;
- (b) Ms McLachlan (or another party) is to lodge and serve an application as to what is sought and affidavits in support by 13 February 2009;
- (c) any notice of opposition or support by any party - and supporting affidavits - should be lodged and served by 6 March 2009;
- (d) a preliminary hearing is to be held as soon as possible after 6 March 2009.

Mediation

[31] A number of parties opposed Court-assisted mediation therefore mediation is not required.

Caucusing

[32] All parties agreed to caucusing of expert witnesses. A number would prefer the caucusing to be assisted by an Environment Commissioner. I will ask for one to be made available if at all possible.

[33] I direct that the experts caucus as follows:

- (1) each expert is to caucus with other experts in his/her field of expertise without riding instructions and in the absence of the parties or counsel;
- (2) the caucusing is to take place in April to June 2009;
- (3) an Environment Commissioner will be made available to assist the caucusing if at all possible;
- (4) each group of experts is to prepare an agreed statement as to:
 - (a) the matters resolved;
 - (b) the outstanding issues etc.

Timetable/hearing

[34] After the mediation and caucusing steps all parties agreed to the subsequent steps in the preliminary timetable as set out in the joint memorandum. Accordingly I direct that the following timetable be followed:



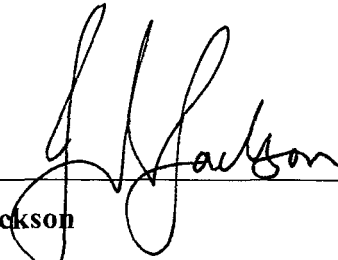
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| (a) | 13 February 2009 | Appellants (other than TrustPower which has a limited appeal) to provide further particulars of the matters in contention. |
| (b) | March 2009 | Resolution of the preliminary issues as to the alleged futility of the hearing given landowner resistance to canals over their land. |
| (c) | April-June 2009 | Commissioner assisted caucusing of experts. |
| (d) | 26 June 2009 | Experts to lodge and serve statements of matters of agreement and matters in dispute. |
| (e) | 24 July 2009 | Council and TrustPower to serve evidence. |
| (f) | 4 September 2009 | Appellants and section 274 parties to serve evidence. |
| (g) | 2 October 2009 | Council and TrustPower to serve rebuttal evidence. |
| (h) | October 2009 | Hearing. |

[35] I reserve leave:

- | | |
|-----|---|
| (a) | for any party to apply to the Court to correct or add to this Memorandum if I have made a mistake or left anything out from what was discussed at the conference; |
| (b) | for any party to apply later on notice to amend any part of the timetable. |

I record that I will deal with issues under (a), but that (b) will be for another Judge.

[36] The Court will endeavour to have these appeals heard in the last quarter of 2009 in Blenheim.


J R Jackson
Environment Judge

