

**BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA**

Decision No. [2018] NZEnvC 195

IN THE MATTER of the Resource Management Act 1991
AND of three appeals under section 120 of the Act
BETWEEN TE RŪNANGA O NGĀTI AWA
(ENV-2018-AKL-000133)
NGĀTI TŪWHARETOA (BOP) SETTLEMENT
TRUST
(ENV-2018-AKL-000134)
SUSTAINABLE OTAKIRI INCORPORATED
(ENV-2018-AKL-000135)
Appellants
AND BAY OF PLENTY REGIONAL COUNCIL
WHAKATĀNE DISTRICT COUNCIL
Respondents
AND CRESWELL NZ LIMITED
Applicant
AND TE RŪNANGA O NGĀI TE RANGI IWI TRUST
NGĀTI PIKIAO ENVIRONMENTAL SOCIETY
TUWHAKAIRIORA O'BRIEN and NGĀI
TAMAWERA HAPŪ
KIWIRAIL LIMITED
RIHI VERCOE
s274 Parties

Environment Judge D A Kirkpatrick sitting alone under s 279 of the Act

Date of Decision: 5 October 2018

Date of Issue: 5 October 2018

**DETERMINATION OF THE ENVIRONMENT COURT
ON REQUEST FOR ACCESS TO DOCUMENTS**

A. The request for access to documents is refused.

Otakiri appeals – request for access to documents



REASONS

[1] Ms Keiller MacDuff, the news editor of Radio Bay of Plenty, has requested access to documents on the Court's file relating to the application by Creswell NZ Ltd to strike out the appeal by Suistainable Otakiri Inc. The application was made on 24 September 2018 in an e-mail to the registrar. Further information was provided on 26 September and 4 October 2018.

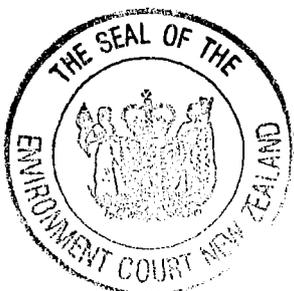
[2] The request is made on the principles of open justice, the public's right to know and the freedom to seek, receive and impart information.

[3] Creswell's application was set down to be heard in court on 3 October 2018. As I wanted to consult the parties before making a decision on Ms MacDuff's request I indicated to them that I would raise this at the conclusion of the hearing. I note that while this hearing was held in open court, no representative of the news media attended it. As it happened, only counsel for Creswell and Sustainable Otakiri appeared that day and so a judicial telephone conference was arranged on 5 October 2018.

[4] Access to Court documents has in the past been the subject of common law rules and judicial guidelines. Now, under the Criminal Procedure Act 2011 and the District Court Act 2016 and with the concurrence of the Chief District Court Judge and at least 2 members of the Rules Committee (at least 1 being a District Court Judge), the Governor-General in Council has made the District Court (Access to Court Documents) Rules 2017. These rules appear to codify the common law and past practice.

[5] Rule 5(1) provides that the rules do not affect the court's inherent power to control its own proceedings.

[6] Rule 8 deals with the general rights of the public, as distinct from the parties. Rule 8(1) provides that every person has the right to access the formal court record relating to a civil proceeding, which these appeals are. The definition of *formal court record* in Rule 4 is a limited list. It includes the notice of hearing and any document that constitutes notice of its contents to the public, and also includes a judgment, an order or a minute of the court, including any record of the reasons given by a judicial officer. The list does not include affidavits or statements of evidence or written legal submissions, which I understand to be the focus of Ms MacDuff's request.



[7] Rule 11 applies where a person is not entitled to access a document relating to a proceeding or an appeal under Rule 8 or Rule 9 (the latter applies to criminal proceedings and so is not relevant here). A request must be in writing (it may be by email). It must identify the person making the request and their address and give particulars of the documents sought and reasons for asking to access the document, including the purpose for which access is sought. It can set out any conditions proposed, such as restrictions on further disclosure. The parties are entitled to a copy of the request unless a judge dispenses with that if it is impractical and there is a process for objections to be made by parties. A judge may then grant the request in whole or in part and with or without conditions or refuse it or refer it to a registrar for determination. Refusal may be based solely for the reason that the request does not comply with the requirements of the rule.

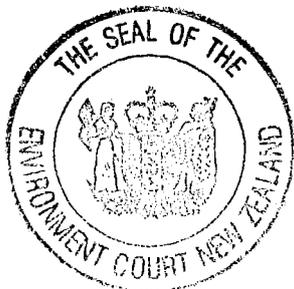
[8] Rule 14 provides that a judge may determine a request for access in any manner the judge considers just. Given the contents of Rules 12 and 13, which set out the matters to be considered in determining a request and the approach to balancing those matters, the "manner" is clearly a reference to matters of procedure rather than substance. I note that I have dealt with this request on the basis of the relevant email messages from Ms MacDuff to the Court, after consulting the parties and after hearing the applications. I did not require the parties to lodge objections.

[9] It is appropriate to set out Rules 12 and 13 in full:

12 Matters to be considered

In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:

- (a) the orderly and fair administration of justice:
- (b) the right of a defendant in a criminal proceeding to a fair trial:
- (c) the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice:
- (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
- (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
- (f) the freedom to seek, receive, and impart information:
- (g) whether a document to which the request relates is subject to any restriction under rule 7:
- (h) any other matter that the Judge thinks appropriate.



13 Approach to balancing matters considered

In applying rule 12, the Judge must have regard to the following:

- (a) before the substantive hearing, the protection of confidentiality and privacy interests and the orderly and fair administration of justice may require that access to documents be limited:
- (b) during the substantive hearing, open justice has—
 - (i) greater weight than at other stages of the proceeding; and
 - (ii) greater weight in relation to documents relied on in the hearing than other documents:
- (c) after the substantive hearing,—
 - (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but
 - (ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

[10] Those lists of considerations demonstrate that public access to court documents involves a range of relevant matters that are important aspects of justice while at the same time being in a state of tension. While Ms MacDuff's request states some of those (open justice, the public's right to know and the freedom to seek, receive and impart information) which are unquestionably central elements of justice, there are other matters which militate against any absolute requirement for disclosure, such as the orderly and fair administration of justice and the right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice.

[11] There is clear guidance in Rule 13 that the stage of the proceeding is an important factor in balancing these considerations, with greater access being available in relation to substantive hearings than at interlocutory stages. That reflects the reality that many things can occur during the course of a proceeding that may appear significant or even determinative to a person who is not directly involved in the proceeding, but the ultimate outcome can rarely be predicted until a full substantive hearing has been held and a final decision made.

[12] In this case, having now heard Creswell's application and the response from Sustainable Otakiri, I consider that the issues relating to whether the appeal by Sustainable Otakiri should be struck out or whether there should be any order for security for costs include evidence concerning the private lives of individuals which need not be disclosed in order to satisfy the principle of open justice. While the legal issues relating to the succession of parties in terms of s 2A of the Resource Management Act 1991 and to security for costs from community groups are matters of public interest, the evidence about the applications of necessity included material that went beyond the legal issues.



I consider that providing the documents to Ms MacDuff or other representatives of the news media would disclose more information than necessary in the interests of justice.

[13] Further, my decision on the applications will address the legal issues and so much of the evidence as necessary to determine those issues. It should be delivered in the near future. Reporting of that decision will, I expect, provide the public with all the information they may seek about these issues.

[14] I therefore refuse Ms MacDuff's request.



A handwritten signature in black ink, which appears to read "D Kirkpatrick", is written over a horizontal line.

D A Kirkpatrick
Environment Judge