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

Decision No. [2018] NZEnvC 207

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to s 120 of the Act
BETWEEN	SUSTAINABLE OTAKIRI INCORPORATED (ENV-2018-AKL-000135) Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL and WHAKATĀNE DISTRICT COUNCIL Respondents
AND	CRESWELL NZ LIMITED Applicant

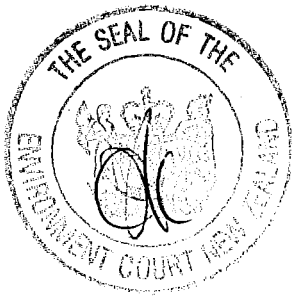
Court:	Environment Judge D A Kirkpatrick, sitting alone pursuant to s 279 of the Act
Hearing:	At Auckland on 3 October 2018
Appearances:	R Enright and R Haazen for Sustainable Otakiri Inc M Jones for Whakatāne District Council D Randal and E Bennett for Creswell NZ Ltd
Date of Decision:	17 October 2018
Date of Issue:	17 October 2018

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR STRIKEOUT OR SECURITY FOR COSTS

A: The application by Creswell NZ Ltd to strike out the appeal by Sustainable Otakiri Inc is dismissed.

B: The application by Creswell NZ Ltd for security for costs against Sustainable Otakiri Inc is adjourned.

C: There is no order as to costs.



REASONS

Introduction

[1] This is a decision on an interlocutory application by Creswell NZ Limited (**Creswell**) against Sustainable Otakiri Incorporated (**Sustainable Otakiri**) either to strike out Sustainable Otakiri's appeal or for an order for security for costs against Sustainable Otakiri.

[2] The substantive proceeding concerns Creswell's proposal to expand an existing water bottling plant on Johnson Road, Otakiri by increasing the current water take, the volume of bottled water produced, the scale of the operation and the number of employees. Creswell has sought resource consents:

(a) under the regional plan, to take water and to discharge stormwater and process wastewater (the **regional consents**); and

(b) under the district plan, to change conditions attached to an existing land us consent, to undertake earthworks within 60m of a river stopbank and to disturb soil on an identified hazardous activities and industries (HAIL) site (the **district consents**).

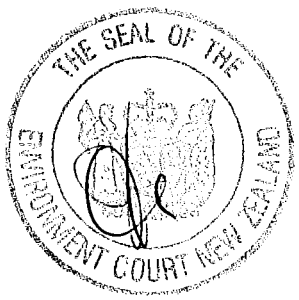
[3] In a joint decision dated 11 June 2018, the resource consents were granted, subject to a range of conditions, by independent hearing commissioners for the Bay of Plenty Regional Council and the Whakatāne District Council.

[4] The appeal by Sustainable Otakiri is against the whole of that decision, that is, against the grant of both the regional consents and the district consents. In response to criticism of the breadth of the grounds stated in its notice of appeal, Sustainable Otakiri lodged a statement of issues dated 10 August 2018 that lists 9 planning issues and gives particulars of each issue in some detail. In general terms for present purposes, I note that the issues include:

(i) the effects of taking water on the aquifer;

(ii) the effect of discharges of stormwater and process wastewater;

(iii) the effects created during construction and operation of the plant on neighbours including effects on rural character and amenity values,



landscape and visual effects, and effects caused by traffic, noise and lighting;

(iv) the status of the activity under the District Plan, including whether it is a commercial or industrial activity without a functional need for a rural location and which will not maintain rural character;

(v) whether the positive effects of the proposal are overstated;

(vi) whether the proposal is consistent with the relevant plans;

(vii) whether consideration of alternatives is relevant.

[5] On those grounds, Sustainable Otakiri seeks relief by either cancelling the regional and district resource consents or amending the consent conditions to address the issues raised on appeal, reduce the scale and intensity of the activity or otherwise avoid, remedy or mitigate its adverse effects.

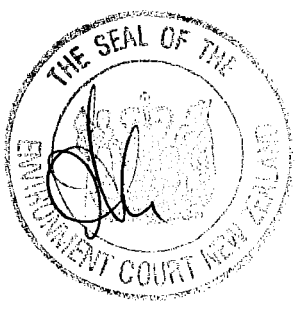
[6] Sustainable Otakiri's notice of appeal also raises two jurisdictional issues:

(a) whether there is jurisdiction to grant consent to the expansion of the existing consented activity under s 127 of the RMA, or whether the extent of the expansion goes beyond the scope of amendments to the conditions and should be assessed as a new proposal; and

(b) whether there was jurisdiction to grant consent in terms of s 104(3)(d) RMA when the application for the district consents was limited notified and, Sustainable Otakiri says, because of the scale and extent of adverse effects it should have been publicly notified.

[7] Sustainable Otakiri has filed an application for declarations from the Court in relation to the first of these jurisdictional matters. That application is presently being case-managed separately.

[8] There are two other appeals against those parts of the original decision relating to the regional consents by the Regional Council: the appellants are Te Runanga o Ngāti Awa and Ngāti Tūwharetoa (BoP) Settlement Trust. Neither of those appellants participated in this interlocutory application. Both respondents stated that they would abide the decision of the Court, and counsel for the District Council appeared only on a watching brief.



Application to strike out appeal

[9] Creswell says that Sustainable Otakiri has no right of appeal because it was not a submitter to either application by Creswell, and it cannot be a successor to any submitter or group of submitters under s 2A RMA because:

(a) it is not possible to discern the existence of an earlier group of submitters or define its membership;

(b) Sustainable Otakiri does not share substantially the same membership as any earlier group.

[10] Creswell's application for consents under the Regional Plan was publicly notified and 125 submissions were made on it. Its application for land use consent was limited notified to some 40 people or organisations comprising iwi, land owners and occupiers and infrastructure providers, and 15 submissions were made on that application.

[11] In the present application, Creswell points to the fact that the Society was only incorporated on 4 July 2018, the day that its notice of appeal was filed. Creswell says that the appeal puts at issue practically every subject canvassed at the original hearing with the exception of cultural effects, and that the statement of issues lodged on 10 August 2018 narrows its ambit only slightly.

[12] Counsel points out that the application for the district consents was notified on a limited basis, while the application for regional consents was publicly notified. Consequently, there are different groups of submitters, being those who were identified as affected persons in respect of the application for district consents, those who actually made submissions on that application and those who only made submissions on the application for regional consents. He submitted that to treat Sustainable Otakiri as the successor of all of them would wrongly expand the rights of appeal which only some of them had.

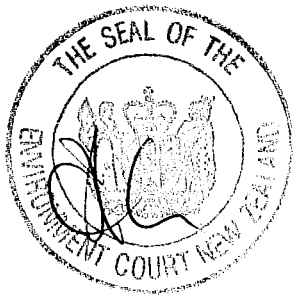
[13] Sustainable Otakiri relies on the evidence of its chairperson, Ms Maureen Fraser, as contained in two affidavits sworn on 10 August 2018 and a third affidavit sworn on 27 September 2018. She has produced a number of relevant documents, including the submissions of members of the original group of people "Save our Otakiri Water and Environment" as well as e-mails and copies of other electronic documents showing communications among members of the group and with a planning consultant retained

by the group.

[14] The case for Sustainable Otakiri is that twelve people living in proximity to Creswell's site on Hallett and Johnson Roads formed an unincorporated body that called itself "Save our Otakiri Water and Environment Group". Eleven of them were identified by the District Council as an affected person and notified; ten of them made submissions on the application for land use consent, and seven of them made submissions on the application for Regional consents. All twelve are now members of Sustainable Otakiri, eight being signatories to the application for incorporation. Sustainable Otakiri now has 19 members, and some of these more recent members made submissions on either the land use or regional applications for consent.

[15] Counsel for Sustainable Otakiri submits that the evidence shows that the original group of persons held meetings to discuss the proposal, exchanged emails, established a Facebook page, a bank account and a donations website, issued a press release and prepared a draft charter, instructed a consultant planner to provide preliminary planning advice and paid for that planner to attend a public meeting, convened two community hui to discuss the proposal, wrote an open letter to the Councils in relation to notification, and supported one another in the drafting of individual submissions. It was this group, following the decision of the Councils, that established Sustainable Otakiri and lodged the notice of appeal.

[16] Counsel for Creswell takes issue with this, and submits that the evidence does not show that Sustainable Otakiri shares substantially the same membership as the original group, and that it does not establish that there was any group that acted in concert in lodging submissions. He submits that there was a group of 21 persons that included some who made neutral submissions and some who made submissions in support of the proposal, and that the common membership between the original group and the society varies between 33 percent and 66 percent depending on the basis for the calculation. He submits that there is no submission by or on behalf of the original group, and relies on the evidence of Michael Gleissner, a director of Creswell, in an affidavit sworn on 20 July 2018 where Mr Gleissner says that Creswell was never aware that there was any such group.



[17] Further, counsel for Creswell submits that, because not all of the original group, nor indeed all of the current members, made submission on both applications, it follows that treating Sustainable Otakiri as a successor to the group will confer on a number of

members a greater interest in the appeal than they could have had as submitters on one or other of the applications, if indeed they made a submission at all.

[18] Counsel for Sustainable Otakiri responds that Creswell is taking an overly absolute approach to the way in which succession should be considered in terms of s 2A of the RMA, given the purpose of the Act and its structure as a participatory regime, especially at first instance. He submits that identifying a group with a common purpose should not be subjected to overly exacting analysis, provided that commonality is present. He says that preparation of identical or template submissions by members of the group, or a single group submission, is not necessary to establish a common purpose, and notes that template submissions may be given less weight by consent authorities at first instance. On the totality of the evidence, he submits that the necessary commonality is evident. In relation to Mr Gleissner's evidence, he submits that his observations about whether there was a group or not are inherently speculative and of little assistance.

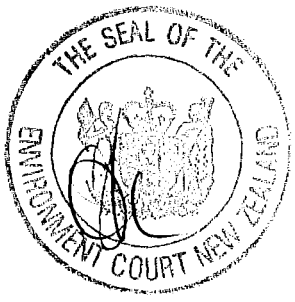
[19] As fall-back positions, counsel notes that if Sustainable Otakiri cannot be the successor to the group in respect of both consents, then severance of part of its appeal could be considered. He submits that the society's position is strongest in relation to the District consent. Alternatively, in response to a question from me, he acknowledged that the six members of the original group who were submitters in respect of both consents could be substituted for Sustainable Otakiri as the appellant. He submitted that, if the Court were minded to consider that as an appropriate outcome, then a short period of five working days should be allowed so that those persons could take advice. In relation to that point, counsel for Creswell very fairly conceded that it was difficult to see how his client might be prejudiced by such substitution.

Succession in proceedings under the RMA

[20] In civil proceedings generally, an original party to a proceeding can be succeeded by a new party on the death, bankruptcy or devolution by operation of law of the relevant estate of the original party.[1]

[21] Under the RMA, section 2A provides:

2A Successors



1 See District Court Rules 2014, Rules 4.49 – 4.53.

> (1) In this Act, unless the context otherwise requires, any reference to a person, however described or referred to (including applicant and consent holder), includes the successor of that person.
>
> (2) For the purposes of this Act, where the person is a body of persons which is unincorporate, the successor shall include a body of persons which is corporate and composed of substantially the same members.

[22] Section 2A(1) appears simply to confirm that the usual position in civil proceedings also applies in proceedings under the RMA. Section 2A(2) expands on this and is the focus of this application.

[23] Section 2A was inserted in the RMA in 1996,[2] apparently prompted by the decision of the Planning Tribunal in *Kennedy's Bush Road Neighbourhood Assn v Christchurch City Council*[3] striking out an appeal where an unincorporated association had lodged a submission on a private plan change and then became an incorporated association and lodged the appeal. In that case the Planning Tribunal held that the two associations were different legal entities and consequently that the effect of the requirement in clause 14(1) of Schedule 1 to the Act the incorporated association could not lodge an appeal based on the submission of the unincorporated association.

[24] According to the discussion by the High Court in *Kaitiaki Tarawera Inc v Rotorua District Council*,[4] the Minister for the Environment, speaking to the second reading of the Resource Management Amendment Bill No 4,[5] said:

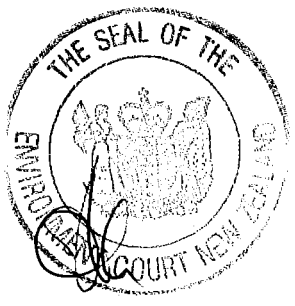
> The [Planning and Development Committee agreed with submissions that expressed concern that where a community group entered in to a statutory process then incorporated to protect individuals from cost, that group was not seen as the same legal entity at later stages of the process. Clause 2A overcomes this difficulty. Similarly, it clarifies that successors can continue actions and are seen as the same person – an important clarification when statutory processes can take many years.

The High Court accepted this as evidence of the intention of Parliament in enacting s 2A(2) RMA.

[25] The essential elements for succession under s 2A(2) RMA are:

a) The original person, being an unincorporate body of persons; and

b) The successor, which includes a corporate body of persons composed of



2 Section 3 Resource Management Amendment Act 1996.

3 *Kennedy's Bush Road Neighbourhood Assn v Christchurch City Council* C 48/95, 7 August 1995 (PT).

4 *Kaitiaki Tarawera Inc v Rotorua District Council* [1997] NZRMA 372 at 376-6.

5 557 NZPD 14313014314, 22 August 1996.

substantially the same members.

[26] Addressing the meaning of "substantially" in s 2A(2), in *Gold Mine Action Inc v Otago Regional Council*[6] the Environment Court said:

> [38] For an incorporated body to be the successor of an unincorporated body, under section 2A(2) of the Act the successor must be composed of substantially the same members as the predecessor. 'Substantially' certainly means more than 50% and may mean over 75% of the members of the preceding unincorporated body. I also hold that the qualifying counting membership of the predecessor must be calculated at the date on which the last action is taken under the RMA (e.g. the lodging of a submission) which qualifies the predecessor to exercise further rights or functions under the Act.

[27] Considering what constitutes a "body of persons," in *Flaherty v Dunedin City Council*[7] the Environment Court found insufficient evidence that the submissions lodged by members of the unincorporated body:

> were a product of acting in concert as a communally organised body sufficient to support the claim that [the corporate group] succeeded that group.[8]

[28] In *Schwass Family Partnership v Marlborough District Council*[9] the High Court said:

> [17] It is correct that to appeal, a person must have made a submission in terms of s 120. An individual who has not made a submission cannot rely upon a corporate submission. Nor can the reverse apply. But where a body of persons makes submissions, whether in the form of one submission to which all persons subscribe, or multiple submissions (as was the case here) supporting or propounding a common view or design to obtain a joint purpose, then I cannot see anything within the statutory framework which would prevent that group of persons pursuing an appeal provided they do so in the same capacity. That is, as an organised group.[10]

[29] Earlier in the same decision, discussing previous decisions of the Environment Court, the High Court held that to be a "body" a group of *persons must be an organised group of people with a common intention and purpose.*[11] It is a question of fact whether the submissions made by members of a common group are made in their private capacity or in their joint capacity in the sense that the strength or weight to the common end or design is heightened by the joining together of the group.[12] Later, the High Court held that a "group submission" is not necessary, nor is it necessary that the body of persons have a name.[13]

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6 *Gold Mine Action Inc v Otago Regional Council* (2002) 8 ELRNZ 129.

7 *Flaherty v Dunedin City Council* C 129/2006 (EnvC).

8 Ibid. at [36].

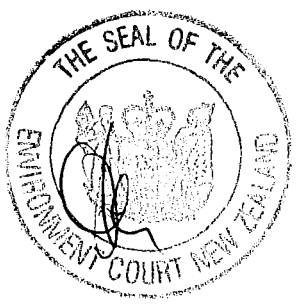
9 *Schwass Family Partnership v Marlborough District Council* High Court, Blenheim, CIV-2005-485-331, 22 June 2005, Gendall J.

10 Ibid. at [17].

11 Ibid. at [16].

12 Ibid. at [17].

13 Ibid. at [19].



[30] In *Clark v Taranaki Regional Council*[14] the High Court stated the purpose of s 2A(2) to be *to provide for continuity of a defined interest in environmental issues*, recognising that community and interest groups wishing to take part in proceedings are likely to formalise their structure part way through their involvement.[15] Considering the meaning of "substantially" and referring to the passage in the decision of the Environment Court in *Gold Mine Action* quoted above, the High Court said:

> [54] The proportion of common personnel might fluctuate a little depending on the circumstances in which a transition has occurred. I agree that 75 per cent of the same individuals belonging to the pre-incorporated group and becoming initial members of an incorporated society is a reasonable yardstick. Provided there has not been a substantial alteration in the purpose of the incorporated society, or the motivation of those committing to it as members, I doubt that the addition of new members after its initial incorporation should disqualify the incorporated society from making out the necessary commonality for the purposes of inheriting standing.

[31] This may be contrasted with an earlier decision of the Environment Court in *Burgess and ors v Wellington City Council*[16] where six original submitters formed an incorporated society with others: by the time of the hearing, there were 27 members, meaning that the original six formed 22 per cent of the then-current membership. The Court said:

> While it might not be helpful to set any absolute threshold figure, I certainly believe that 22% is nowhere near enough to meet the plain meaning of the word *substantially*.

[32] In considering the question of numbers of members of a successor body, it is worth bearing in mind that in order to apply for incorporation, a copy of the rules of the society on which the application is written must be signed by not less than 15 members.[17] Further, a simple majority of members is all that is required to consent to the application for incorporation.[18] Presumably only those members who consent would be willing to sign the application for incorporation, but the legislative requirements do not require that. In answer to my question, counsel acknowledged that it was unlikely that the number 15 was of significance for resource management purposes. Certainly, there is nothing in s 2A(2) RMA to suggest that a body of persons must have any particular minimum number above two. If the chosen corporate vehicle of succession were a company, then two persons would be ample.[19]

[33] In this case the evidence is that there was an original group of 12 persons. Of those

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14 *Clark v Taranaki Regional Council* [2015] NZHC 2676.
15 Ibid. at [35].
16 *Burgess and ors v Wellington City Council* [2011] NXEnvC 118.
17 Section 7(1)(a)(ii) Incorporated Societies Act 1908.
18 Section 7(1)(b)(i) Incorporated Societies Act 1908.
19 Section 10, Companies Act 1993.

12, all are current members of Sustainable Otakiri but only eight were among the original 15 who signed the application for incorporation. Eleven of the 12 were identified by the District Council as being affected and were notified; ten lodged submissions on the district consents; and seven lodged submissions on the regional consents. There are presently 19 members of Sustainable Otakiri.

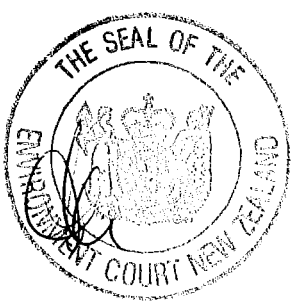
[34] While only eight of the 12 were signatories to the application for incorporation, two original members were the witnesses to the signature of those eight,[20] one was overseas at the time of incorporation and only one was not a submitter on either application. The other current members include four who were submitters on the district consents but not the regional ones (although two of those expressed their submissions as being neutral) and three who were submitters on the regional consents but not the district ones.

[35] As the submissions of counsel for Creswell revealed, one can spend quite a bit of time and thought in using these numbers to calculate, in various ways, the extent to which the original group maps to the current membership of the society.

[36] Counsel for Creswell pointed to the fact that Sustainable Otakiri was incorporated on the day its notice of appeal was filed, but there is nothing in s 2A that limits the time when succession can occur. Counsel also noted that a purpose of incorporation was to limit potential liability for costs. As the extract from Hansard quoted in *Kaitiaki Tarawera* makes clear, that was a factor known to Parliament when s 2A was enacted. I also note that Creswell is incorporated as a limited liability company. Really the liability issue is relevant to the alternative application for security for costs rather than the issue of succession.

Evaluation of succession issue

[37] The central issues raised by Creswell's application are whether there was indeed an unincorporated *body* of persons and whether Sustainable Otakiri is composed of *substantially* the same members as the original unincorporate body of persons. Respectfully acknowledging the caselaw cited above, the words *body* and *substantially* in the statutory text are ordinary words in common usage and so at the outset their ordinary meanings should be considered. In cross-checking the provision to the extent that the text is unclear or a literal interpretation may lead to a result in apparent conflict



[20] Each signature must be witnessed by a person who has not signed the rules: s 7(2)(a) Incorporated Societies Act 1908.

with the policy of the Act, illumination may be obtained from considering the Act's purpose.[21] The purpose of the RMA includes protecting natural and physical resources in a way which enables people and communities to provide for their well-being, health and safety. The RMA displays an evident policy that decisions about resources are best made by allowing public participation[22] and the enactment of s 2A was a remedial measure to enhance rights of participation rather than to limit them.[23]

[38] The relevant meanings of *body* in this context are given[24] as:

> **12. a.** A united or organized whole; an aggregate of individuals characterized by some common attribute; a collective mass.
>
> **13. a.** A group of people with a common purpose or function acting as an organized unit, as for deliberation, government, or business; a society, organization, league, or council.

[39] These definitions are consistent with the caselaw referred to above. The factual issue is whether the evidence shows that the unincorporate group in this case was organized and had a common purpose. In support of a finding that they were a *body* of persons, it is evident that they met and communicated with one another, shared information and adopted a similar approach to the application process. Against that, they were not highly organized, did not lodge a single submission or identical submissions and did not always present themselves as being a group.

[40] It may be observed that individuality is not axiomatically the antithesis of commonality. Rather than necessarily being opposites, the two states can co-exist and interact to inform each other. In these definitions of *body* one may note the references to *an aggregate of individuals* and *an organized unit, as for deliberation.* In those senses, one can conceive of a body of persons as including a group of individuals which has a degree of, but not over-much, organisation and which pursues several related issues with varying degrees of focus and vigour but nonetheless in the same overall direction.

[41] In my view, in this case the unincorporate group of residents in the vicinity of the site did form a body of persons for the purposes of s 2A(2) RMA. The principal supporting element for that finding is that there is sufficient evidence of their interactions with one another in pursuit of a common purpose which, from reading their submissions, was the protection of their environment and their amenity values. The individual differences in

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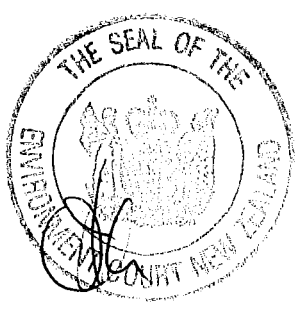
21 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; *Auckland City Council v Glucina* [1997] 2 NZLR 1 at 4 (CA).

22 *Murray v Whakatane District Council* [1999] 3 NZLR 276, [1997] NZRMA 433.

23 Fns 3 and 4.

24 Oxford English Dictionary, online edition.



their actions and their submissions do not detract from the commonality of their purpose. The presence of others does not derogate from that: the existence of participants at the fringes does not undermine the existence of a core group.

[42] The relevant meanings of *substantially* are given[25] as:

> **2.** In a sound or solid manner; on a solid or firm foundation; effectively, thoroughly, properly, soundly.
>
> **3.** Fully, amply; to a great extent or degree; considerably, significantly, much.

[43] These definitions differ somewhat from the caselaw at least insofar as they do not establish any particular quantitative threshold. While the character of sameness required by s 2A(2) RMA indicates identicalness, that is tempered rather than emphasised by *substantially*. The notion of a majority is consistent with *thoroughly* or *fully*, but it is not clear that any particular level of super-majority is required in this context. Additionally, the requirement in another statute to have at least 15 members to incorporate as a society may result in a false basis for the calculation. For example, seven original members of a group would be a minority in the formation of an incorporated society, while eight would be a majority. Basing the validity of succession on a single person is a result that does not sit well with the purpose and participatory policy of the RMA. While I must acknowledge, with respect, the identification of 75% as a "reasonable yardstick",[26] that phrase plainly indicates that it is not intended to be a precise measure. As noted previously, as few as one or two individual submitters could incorporate as a company and so render any such yardstick meaningless.

[44] In my view, there is sufficient evidence to show that almost all (10 out of 12) of the members of the original unincorporate group of submitters to the district consents were involved in the incorporation of Sustainable Otakiri. That continuity in respect of the application for the district consents (which were notified on a limited basis) forms a core group of people which is entitled to retain their rights of appeal through Sustainable Otakiri as the appellant.

[45] The fact that the appeal also is against the parts of the decision on the application for regional consents does not unlawfully expand the rights of appeal as seven of that core group were also submitters on that application. It would not be just to deny the validity of succession in respect of the district consents because of the linkage to the regional consents. While my decision on the application is primarily based on the

25 Oxford English Dictionary, online edition.

26 *Clark v Taranaki Regional Council* [2015] NZHC 2676 at [54].

continuity of participation in respect of the district consents, I am also satisfied that in this case it is appropriate for Sustainable Otakiri to succeed to the appeal rights of that somewhat more limited group of original submitters.

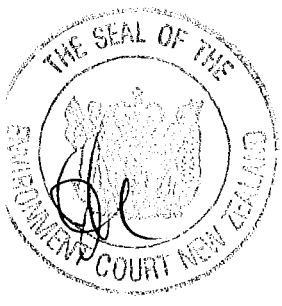
[46] The fact that others have also joined the society is not determinative of the assessment of whether the original group is substantially the same as the incorporated body. As noted in the *Clark* decision, it is doubtful that the addition of new members should disqualify the original group from creating an incorporated successor. The crucial matter is the continuity of the original body of persons.

[47] For those reasons I dismiss Creswell's application to strike out the appeal by Sustainable Otakiri.

Security for costs

[48] As an alternative to striking out Sustainable Otakiri's appeal, Creswell applies for security for costs against Sustainable Otakiri in the amount of $36,750 – 57,420. In its original application this included a ground of abuse of process, but at the hearing counsel acknowledged that this had been included as a supplementary matter in relation to an appellant without obvious resources providing security rather than as an independent ground.

[49] Relying on the assessment and calculations of its director, Mr Gleissner, Creswell expects that it would need to call all 13 of its expert witnesses to address the broad range of Sustainable Otakiri's appeal. It has been given an estimate for those witnesses' costs and expenses of between $300,000 – 320,000, of which it further estimates that 40% ($120,000 – 128,000) would be specific to this appeal. It also has an estimate of legal costs of $120,000 overall, of which $50,000 would be attributable to this appeal. In answer to my question, counsel estimated that at this stage a hearing of the appeals might require 6 or 7 sitting days. On that basis it estimates its likely total costs attributable to this appeal to be $174,000. Taking that figure of $174,00 and applying a rate of 25 – 33% as being typical of awards of costs in this jurisdiction, it arrives at the figures of $36,750 – 57,420.



[50] In support of its application, its counsel notes that Ms Fraser candidly states that Sustainable Otakiri is not in a position to pay security in the amount sought by Creswell or a lesser amount and would have to undertake fundraising from its members. He

submits that it might be more accurate to say that the society is unwilling to pay security by levying its members and notes that no evidence has been presented as to their means. He submits that it is appropriate that a responsible initiator of legal proceedings calls on its resources to meet the potential obligations that its own action entails.

[51] As noted above in relation to the succession issue, a purpose of incorporation is to limit potential liability for costs. As the extract from Hansard quoted in *Kaitiaki Tarawera* makes clear, that was a factor known to Parliament when s 2A RMA was enacted. Creswell, like most groups of people involved in commercial activities, has incorporated in a manner that is intended to limit its liability. The understandable desire of every person to limit their liabilities does not count for much either way in terms of security for costs. The real issue is whether a person commencing a proceeding is in a position and prepared to deal with the consequences of doing that, including paying costs should it be ordered to do so.

[52] Counsel for Sustainable Otakiri relies on the discretionary considerations around not shutting out a meritorious case and enabling affected persons to be heard. He says that the case has been focussed and narrowed and that while there are private interests relating to the amenity values of the residents, there are also public interest factors relating to considerations under Part 2 of the RMA and the extent of change proposed to an existing environment. He also makes reference to the jurisdictional issues relating to the scope of the changes to conditions under s 127 RMA and the notification issue under s 104(3)(d). He noted that Ms Fraser had acknowledged that Sustainable Otakiri would try to meet any order, but his primary submission was that no security should be ordered.

Relevant Law

[53] The general power to require provision of security for costs arises pursuant to section 278(1) of the Act, which provides that the Environment Court has the same powers as the District Court, and the relevant provisions of the District Court Rules 2014 relating to security for costs.

[54] Rule 5.48(1)(b) of the District Courts Rules allows an order for security for costs to be made if the Court is satisfied that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceedings. Pursuant to rule 5.48(6) and the definitions in rule 1.4, in these proceedings the appellant is a "plaintiff" and the applicant is one of the "defendants."

[55] If the threshold in rule 5.48(1)(b) is met, rule 5.48(2) provides that the Court may, if it thinks fit in all the circumstances, order the giving of security for costs. It should be noted that the power to require provision of security for costs is discretionary and need not be exercised even if the Court is satisfied that the threshold may otherwise have been met.

[56] Pursuant to rule 5.48(3)(a), an order under rule 5.48(2) (if made) must require the plaintiff to give security for costs "in respect of the sum that the court considers sufficient" by paying that sum into court or by giving security for that sum to the satisfaction of the Registrar. Further, pursuant to rule 5.48(3)(b), the order may stay the proceeding until the sum is paid or satisfactory security is given.

[57] There is also power under section 17 of the Incorporated Societies Act 1908, as follows:

> (1) Where a society is the plaintiff in any action or other legal proceeding, and there appears by any credible testimony to be reason to believe that if the defendant is successful in his defence the assets of the society will be insufficient to pay his costs, any Court or Judge having jurisdiction in the matter may require sufficient security to be given for those costs, and may stay all proceedings until that security is given.

[58] In *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council*,[27] Judge Skelton held that while both the relevant rule and section 17 applied, the more circumscribed threshold in section 17 should prevail where the subject of the application is an incorporated society.

[59] In the context of the RMA it is also relevant that the Court's power to award costs under s 285 RMA is fully discretionary, that there is no presumption that costs would follow the event and no scale of costs, and that under the RMA litigation carries a high element of public interest and provides for public participation in the submissions and appeal process.[28] As the Court of Appeal observed in analogous circumstances in *Ratepayers and Residents Association Inc v Auckland City Council*:[29]

> Any court exercising a discretion in the interests of justice in the particular case must have regard to any public interest considerations which the litigation serves. The emphasis placed on the rule of law reflects our society's insistence on providing controls on the exercise of power. As the development of public law in common law jurisdictions amply demonstrates, compliance with the law by those acting under statutory powers is itself a matter of public interest . . .

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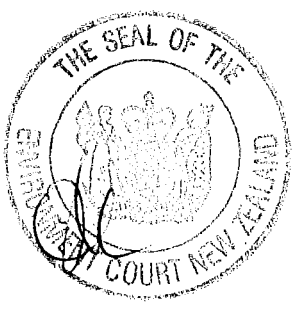
27 *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council* [1997] NZRMA 132, at 139-140

28 *Mahanga E Tu Incorporated v Hawkes Bay Regional Council* [2011] NZEnvC 21, (2011) 16 ELRNZ 332 at [14].

29 *Ratepayers and Residents Association Inc v Auckland City Council* [1986] 1 NZLR 746 at 750 lines 19-22 and 32-37 (CA).



> In acting in a responsible way as watchdogs of the public interest community organisations perform a valuable public service. Having in the public interest opened the Court door to the airing of public law questions, the public interest in having those questions proceed to hearing and determination must be a factor for consideration in deciding whether to order security, and if so, at what figure it should be fixed.

[60] In *Fonterra Co-Operative Group Limited & Anor v Manawatu-Wanganui Regional Council*,[30] Judge Dwyer confirmed the relevant principles and criteria against which the Court's discretion might be exercised as those summarised in the head note of the Judgment in *Bell-Booth Group Ltd v Attorney-General*:[31]

1. The ordering of security for costs is discretionary.
2. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.
3. In the exercise of the discretion there is no predisposition one way or the other.
4. The interests of both the plaintiff and the defendant should be considered. The Court should not allow the rule to be used oppressively to shut out a genuine claim by a plaintiff of limited means. On the other hand, an impecunious plaintiff must not be allowed to use its inability to pay costs as a means of putting unfair pressure upon a defendant. It is inherent in the whole concept of security, however, that the Court has the power to order a plaintiff to do what it is likely to find difficulty in doing, namely, to provide security for costs which *ex hypothesi* it is unable to pay.
5. Factors to be taken into account in the exercising of the discretion include the following:
   (a) The merits and *bona fides* of the plaintiff's case should be considered even though it is difficult to assess merits at an interlocutory stage. The Court should consider whether the action of the plaintiff has reasonable prospects of success. ...
   (c) The means of interested shareholders and creditors and their ability to assist with the provision of security may be a relevant matter. The means by which a plaintiff overcomes the problem of provision of security is, however, a matter for the plaintiff. ...
   (e) Whether the making of an order for security might prevent the plaintiff proceeding with a *bona fide* claim. ...
   (h) Whether there are grounds for thinking that the defendants are using the application oppressively to prevent the plaintiff's case from coming before the Court.
6. Quantum of security
   (a) The amount of any security is not intended as a pre-estimate of the actual amount of party and party costs that might become payable should the case go to Court and the defence succeed.
   (b) Security should be fixed at an amount which is appropriate in the interests of justice and such requires a consideration of all the issues bearing on that matter in a particular case.

A balancing of all these factors is required, bearing in mind that if a plaintiff wins he can get the advantage of costs against the defendant enforceable against the defendant's assets and it is only fair that a defendant sued by an impecunious plaintiff should have some means of recovering his costs if he wins by the ordering of security.

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30 *Fonterra Co-Operative Group Limited & Anor v Manawatu-Wanganui Regional Council* [2013] NZEnvC 32 at [35] (EnvC).

31 *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 (HC).

[61] An important point about access to justice in the context of security for costs was made by Kós J in *Highgate on Broadway Ltd v Devine*:[32]

> Access to justice is an essential human right. The cost of exercising that right is the payment of costs in the event of failure. The right of a successful defendant to costs in that event is arguably subordinate to the plaintiff's right to be heard. Strong social policy considerations favour the use of Courts as an accessible forum for the resolution of disputes and grievances of almost all kinds. Only where a clear impression can be formed that the plaintiff's claim is altogether without merit – so that in the alternative it would be amenable to being struck out – would it be right for security to be ordered where to do so would bring the plaintiff's claim to dead halt. In cases where the claim is being seriously misconducted (with undue complexity or expense), security orders short of effective termination of the claim may be appropriate. As the Court of Appeal said in *McLachlan* [*AS McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 at 751 (CA)], "access to the Courts for a genuine plaintiff is not lightly to be denied".

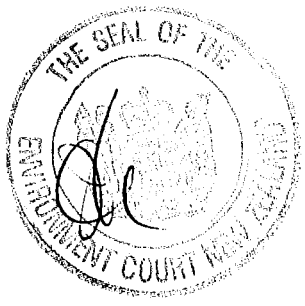
[62] In *Fonterra*,[33] the appellant was given the opportunity to narrow the issues before the Court and declined to do so. The Court considered that this factor was relevant in determining whether to grant the application for security for costs because it was likely to be taken into account if any costs claims were made and would increase the likelihood of costs being awarded, as well as the likelihood that a higher than usual level of costs might be awarded

Evaluation of security for costs

[63] There is no real issue about the threshold in this case, Ms Fraser having acknowledged that Sustainable Otakiri has no resources of its own.

[64] There are merits to the cases on both sides: Sustainable Otakiri points to a recommendation by the district planner under s 42A RMA to the Councils' commissioners to decline the grant of consent, while Creswell points to the decision of the commissioners to grant consent subject to conditions.

[65] I am concerned that there is no evidence as to the means of the members of Sustainable Otakiri. I am not convinced that they would be shut out of participating in the event that they had to provide some security for costs. I will proceed on an assumption that there is likely to be some benefit to them if the expansion of the water bottling plant on a neighbouring property does not occur, and that such a benefit represents value at least to them personally if not also in respect of the value of their properties. That is a factor weighing in favour of requiring security to be given for the purpose of recognising



32 *Highgate on Broadway Ltd v Devine* [2013] NZAR 1017 at 1026 (HC).

33 Fn 25 at [31].

a valuable benefit as against the cost to Creswell, as a successful applicant, of defending the Councils' decision.

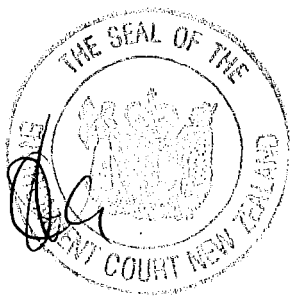
[66] I do not consider that Creswell's application is oppressive in terms of being a tactic to shut out an appellant. However I also do not consider that its calculation of the amount that should be ordered as security is complete, as all its assumptions are cast in Creswell's favour. There are several factors that might serve to reduce the quantum of security, such as the scope for mediation to narrow or even settle issues within the scope of the appeal and the likelihood that the Court will be concerned to control the extent to which expert evidence needs to be called.

[67] It is pertinent to recall here that there are two other appeals against the decision, although both of them are limited to the regional consents while Sustainable Otakiri's appeal also challenges the grant of the district consents. Given the obviously contestable issues relating to factual matters associated with the amenity values of this environment it is not appropriate at this stage to express any view on the merits of the appeal. It is relevant to take into account that while the appeal seeks that the Councils' decision be overturned, an alternative is that the conditions of consent be amended to address the issues raised in relation to the quality of the environment and the maintenance and enhancement of amenity values. The Court's experience is that mediation is likely to be a worthwhile process for the parties to engage in, and both counsel advised that their clients were willing to do so.

[68] In these circumstances, having dismissed the application to strike out the appeal and before mediation has occurred, I consider it to be premature to determine the application for security for costs. I consider it would be better in terms of the purpose of the RMA to allow for the process of mediation to occur before fully assessing the issues of the relative merits of the parties' positions and the likely quantum of costs that might be awarded. I also consider that determining the issue of security for costs now might hamper the mediation process without much countervailing benefit.

[69] It is also unnecessary to determine the issue of security for costs in relation to the mediation process, as costs generally do not apply to that process as is set out in section 9 of Appendix 2, the protocol for court-assisted mediation, to the Court's Practice Note 2014:

> The mediation, if conducted by an Environment Commissioner, will be without fee payable to the Court. The parties shall meet their own costs of the mediation unless they agree otherwise between themselves. The mediator has no power to make any order for costs

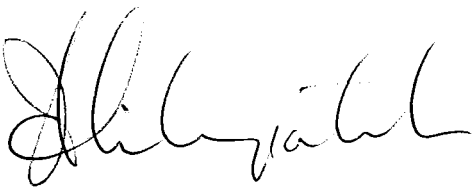


as between parties or in favour of the Court.

[70] For those reasons I will therefore adjourn this application to be dealt with after mediation has occurred.

Costs

[71] There is no order as to costs on these applications.



D A Kirkpatrick
Environment Judge