

BEFORE THE ENVIRONMENT COURT
AT AUCKLAND

I MUA I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU

Decision [2020] NZEnvC 117

IN THE MATTER of the Resource Management Act 1991
(the Act)

AND of an appeal under Clause 14 of the First
Schedule to the Act

BETWEEN SWAP STOCKFOODS LIMITED

(ENV-2019-AKL-000065)

Appellant

AND BAY OF PLENTY REGIONAL COUNCIL

Respondent

Court: Environment Judge MJL Dickey sitting alone under s 279 of the Act

Submissions: Mr J Brabant for Glencore Agriculture (NZ) Limited, International
Nutritionals Limited trading as Agrifeeds and ADM New Zealand
Limited
Mr T Richardson for Swap Stockfoods Limited
Ms R Zame for Bay of Plenty Regional Council
Ms V Hamm for Port of Tauranga
Mr J Gear for Te Runanga o Ngai Te Rangi Iwi Trust
Mr D Adams for Ballance Agri-Nutrients Limited
Ms M Paddison for Toi Te Ora Public Health

Date of Decision: 5 August 2020

Date of Issue: 5 August 2020

DECISION OF THE ENVIRONMENT COURT ON APPLICATION FOR WAIVER



- A. The application for waiver is granted.
- B. Glencore Agriculture (NZ) Limited, International Nutritional Limited trading as Agrifeeds and ADM New Zealand (the applicants) are joined to this appeal as s 274 parties.

REASONS

Introduction

[1] This appeal was filed on 24 April 2019, and relates to part of a decision by the Bay of Plenty Regional Council on Proposed Plan Change 13 (**PC13**) to the Regional Natural Resources Plan.

[2] PC13 Topic 2: Handling of bulk solids material, which includes proposed Rule AQ R22, has been set down for hearing in the week of 19 October 2020.

The application for waiver

[3] On 13 July 2020 Glencore Agriculture (NZ) Limited, International Nutritional Limited trading as Agrifeeds and ADM New Zealand (**the applicants**) filed a notice to become parties to this appeal under s 274 of the Act. The notices were accompanied by a joint application for waiver to file the s 274 notices out of time and a joint memorandum in support of the waiver application.¹ The timeframe to file s 274 notices on this appeal expired on 17 May 2019.

[4] The applicants' primary business is the import and export of bulk goods including the purchase, manufacture and distribution of agricultural products and animal nutrition commodities:

- (a) Glencore Agriculture (NZ) Limited specialises in international and domestic import, purchase, supply, distribution, storage, and manufacture of grain commodities, agricultural products and animal feed products.
- (b) International Nutritional Limited trading as Agrifeeds is a joint venture between Fonterra and Wilmar Trading (Australia) Ptd Limited. Agrifeeds'



¹ Memorandum of counsel in support of joint application for waiver, dated 13 July 2020.

principle activities include the purchase, manufacture and distribution of animal feeds and agricultural products both offshore and within New Zealand.

- (c) ADM NZ is part of the global ADM network and is a bulk importer of stockfeed into New Zealand. ADM has a warehouse and sales footprint covering both the North and South Islands and is based in Mount Maunganui and primarily provides goods to New Zealand's dairy industry.

[5] Mr Brabant, counsel for the applicants, submitted that the applicants all assumed that their activities, which have always been permitted activities, would not be affected by PC13.

[6] He submitted that collectively the applicants represent 75% of the Port of Tauranga's annual bulk material importers, and are arguably the entities who will be the most impacted by proposed Rule AQ R22.

[7] Mr Brabant set out the following reasons and grounds for seeking the waiver in their application and joint memorandum:

- (a) The Applicants acknowledge the considerable delay in seeking to join the appeal.
- (b) The delay in lodging the s 274 notices simply arose from the Applicants not being aware of the potential ramifications for their businesses arising from PC13 and the significant implications of proposed changes to rule AQ R22 relating to the Handling Bulk Materials provisions to the Applicants' industry and current operations. They have not been involved in the plan change process to date.
- (c) Glencore first became aware of proposed Rule AQ R22 and its implications on 24 June 2020 when informed by the Appellant of its appeal. Further details pertaining to the Applicants' discovery of the rule are set out in the accompanying Memorandum of Counsel.
- (d) The First Applicant sought urgent legal advice and engaged specialist counsel. The Second and Third Applicants were contacted by the First Applicant to represent the industry and jointly engaged counsel.
- (e) Section 274 notices were required to be filed by 17 May 2019. Thus, the Applicants' notices are approximately 13 months overdue.
- (f) Notwithstanding the delay, the Applicants submit no party will be unduly prejudiced by granting the waivers as:
 - i. Although material steps have been taken towards the resolution of the majority of PC13 appeals, Topic 2: Handling of Bulk Materials has not been resolved;
 - ii. The Applicants support the Appellant's position, and thus are engaging with an issue to be addressed before the Court in any event;
 - iii. The Applicants are aware of and agree to comply with the evidence timetable set down by the Court. If the waiver is granted the



Applicants are available to proceed to hearing after 18 September 2020. Accordingly, the Applicants do not seek any amendments to the timetable or delay of hearing;

- iv. Evidence in relation to Topic 2: Handling of Bulk Materials has not been exchanged, nor has expert caucusing occurred. Therefore, no party will be unduly prejudiced by the Applicants' involvement with evidence preparation;
 - v. The Court is likely to gain substantial assistance from the Applicants' involvement in the appeal as:
 - 1. Individually and collectively the Applicants have extensive industry knowledge, experience, and interest in the discharge of contaminants to air from the handling of bulk materials;
 - 2. Evidence given on behalf of the Applicants will assist the Court in determining this important regional issue by providing context to a large importing/agricultural sector which makes up a large part of the Port of Tauranga custom;
 - 3. Evidence given on behalf of the Applicants will assist in an understanding of the implications and effects of proposed Rule AQ R22 and the current effects on the Airshed, and further will assist in determining the most efficient, effective and appropriate rule to manage potential effects arising bulk material handling and storage; and
 - 4. The Applicants represent an important sector both domestically and internationally. It is in the interest of natural justice that the Applicants be afforded an opportunity to be involved.
 - vi. The relief sought by the Appellant accords with the relief sought by the Applicants. Accordingly:
 - 1. All matters and issues the Applicants are interested in are already before the parties, Council and the Court; and
 - 2. The Applicants intend to support the appeal and provide its own evidence in support of the relief sought.
 - vii. Allowing the Applicants to join in the proceedings as a party would be consistent with the RMA's participatory nature.
- (g) The exercise of the Court's discretion is appropriate in this case for the reasons set out above.

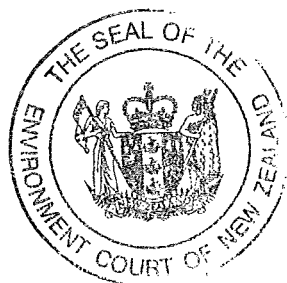
[footnotes removed]

The parties' responses to the application

[8] The parties were asked to advise the Court of their position in relation to the application for waiver by 22 July 2020.

[9] The Bay of Plenty Regional Council (**the Regional Council**) has advised the Court that it will abide by the decision of the Court. However, Ms Zame, counsel for the Regional Council, noted that:

- (a) There has been significant delay in filing the s 274 notices, as the notices are almost 14 months out of time.



- (b) Topic 2: Handling of Bulk Solid Material is the only remaining topic before the Court on PC13. Topic 2 relates to three appeals,² although the applicants only seek to join this appeal by Swap Stockfood Limited.
- (c) The appeal by Timberlands Limited has been resolved between the parties to that appeal. A consent memorandum and draft consent order were filed with the Court on 18 December 2019. The draft order is lying in Court pending resolution of the remaining two appeals.
- (d) Topic 2 is subject to timetabling directions, and is set down for hearing in the week commencing 19 October 2020.
- (e) The parties attended mediation in January 2020. The Regional Council does not wish to participate in further mediations given the timetabling directions in place.

[10] Ms Zame requested that if the waiver is granted the applicants be required to comply with the existing timetable, provide a list of their proposed witnesses and expertise and confirm that the current allocation of 3 days hearing time is sufficient.

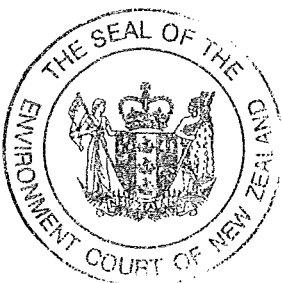
[11] Ms Paddison, counsel for s 274 party Toi Te Ora Public Health, advised that it does not consent to the application for waiver, but will abide by the Court's decision. In support of its position she made the following submissions:

- (a) The delay is significant.
- (b) It is difficult to see how the applicants, in light of PC 13 being advertised, could have assumed that their activities would not be affected by PC13 or have an expectation that they are entitled to special notification.
- (c) The applicants' interests could be adequately represented by the appellant without them becoming parties to the appeal.

[12] The appellant, Swap Stockfoods Limited, and s 274 party Ballance Agri-Nutrients Limited have no objection to the granting of the waiver.

[13] Section 274 parties Te Runanga o Ngai Te Rangī Iwi Trust and Port of Tauranga

² ENV-2019-AKL-000065 Swap Stockfoods Limited v Bay of Plenty Regional Council, ENV-2019-AKL-000073 Timberlands Limited v Bay of Plenty Regional Council and ENV-2019-AKL-000077 Ballance Agri-Nutrients Limited v Bay of Plenty Regional Council.



Limited advise that they will abide by the decision of the Court.

Sections 274 and 281 of the Act

[14] Under s 281(1)(a)(iia) of the Act a person may apply to the Court for a waiver of the time within which a person may lodge a notice of interest under s 274 of the Act.

[15] There are two tests to be met by an applicant relying on s 281. The overarching test, derived from s 281(1), is whether the Court should exercise its discretion to grant the waiver or directions sought. What may be described as the threshold test relates to whether there is any undue prejudice to the parties to the proceeding as set out under s 281(2) and (3).³

[16] Therefore, the consideration of applications under s 281 is a two step process. First the Court is required to make a determination as to whether or not the parties to the proceeding will be unduly prejudiced if the waiver is granted. Secondly, if no party is unduly prejudiced, the Court must determine the waiver application on its merits.

[17] In addition, in this case the Court must also determine whether the applicants have the requisite interest "greater than the general public has" to join the appeal under s 274(1)(d) of the Act considering they did not file submissions on PC13 .

Discussion

Do the applicants have an interest greater than the general public?

[18] A potential interested party that did not make a submission on a plan change must demonstrate that they have an interest in the proceedings that is greater than the interest the general public has in order to join an appeal.⁴

[19] The Environment Court in *Mt Christina Limited v Queenstown Lakes District Council*⁵ concluded that s 274(1)(d) is meant to capture those whose interests set them apart from the general public. For example, where the relief pursued in an appeal could have direct consequences for an individual (whether an advantage or disadvantage in a financial, property, or other significant sense) that sets that person apart from the general public.

[20] Mr Brabant also referred to *Wallace Group Limited v Auckland Council* in which

³ *Shirtcliff Banks Peninsula District Council* EnvC C17/99, 19 February 1999.

⁴ Section 274(1)(d) of the Act.

⁵ *Mt Christina Limited v Queenstown Lakes District Council* [2018] NZEnvC 190.



the Court stated that:⁶

It is the relationship between the interest and the consequent effect of the proceedings on the interest, rather than the actual interest itself, which is important. Picking up once again on the key theme "*some advantage or disadvantage*", such must be direct and not just emotional or intellectual.⁷

[21] He submitted that in this case the applicants' interest is greater than that of the general public because proposed Rule AQ R22 will capture the entirety of the applicants' operations. This is because the handling of bulk material inherently results in discharges of contaminants to air which would exceed the trigger levels in the proposed rule.

[22] Further, he submitted that there are commercial, logistical and industrial needs for the applicants to operate from the Port of Tauranga and within the proposed Airshed.

[23] Having taken into account that information, I determine that the applicants have an interest in proposed Rule AQ R22 that is greater than the interest the general public has.

Will granting the waiver result un undue prejudice?

[24] In considering the first step of the test under s 281 of the Act, it is clear in this case that no party has claimed that they will be unduly prejudiced by the application for waiver.

[25] I therefore turn to consider the progress made in relation to the appeals filed on PC13, and in particular the progress made in this appeal, to determine if any party will be unduly prejudiced.

[26] The only remaining topic to be determined on PC13 is Topic 2: Handling of Bulk Materials. This topic is subject to timetabling directions and has been set down for hearing.

[27] The applicants have indicated through Mr Brabant that:

(a) They are interested in issues that are already before the parties; the

⁶ *Wallace Group Limited v Auckland Council* [2017] NZEnvC 106 at [25].
⁷ See *Remarkables Park Ltd v Queenstown-Lakes District Council* Environment Court Christchurch, 26/2005, 18 February 2005.



applicants intend to support the appeal and provide their own evidence in relation to the relief sought; and

- (b) They agree to comply with the existing evidence exchange timetable.

[28] It is for the above reasons, and primarily because the matter will continue towards hearing without the existing timetable being interrupted, that I am satisfied that no party will be unduly prejudiced by the granting of this waiver.

Should the Court exercise its discretion

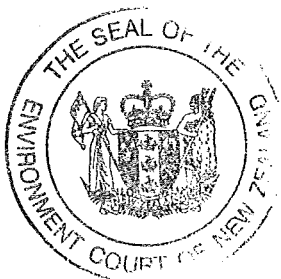
[29] The remaining issue to be determined is whether the Court should exercise its discretion under s 281 of the Act to grant the application for waiver.

[30] In *Omaha Park Limited v Rodney District Council*,⁸ the following criteria were identified as guidance for the Court's consideration when determining whether to exercise its discretion:

- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) The scheme of the RMA relating to public participation;
- (d) What has happened in the proceedings in the meantime; and
- (e) The effect of introducing new parties might have on progressing the appeal to resolution.

[31] In this case the delay in filing the s 274 notices has been significant. However, Mr Brabant submitted that the applicants are of the view that their introduction to the proceedings would:

- (a) Provide the Court with important contextual background as to the location, use and operation of bulk material handling and storage activities as they have extensive industry knowledge, experience, and interest in the discharge of contaminants to air from the handling of bulk materials;
- (b) Assist the Court by providing context and evidence relating to the large importing/agricultural sector which makes up a large part of the Port of



⁸ *Omaha Park Limited v Rodney District Council* Environment Court Auckland, A46/08, 23 April 2008.

Tauranga custom; and

- (c) Assist in contributing to an understanding of the implications and effects of proposed Rule AQ R22 and the current effects on the Airshed; and
- (d) Assist in determining the most efficient, effective and appropriate rule to manage potential effects arising from bulk material handling and storage.

[32] In determining whether to grant the waiver I have also considered the positions of the Regional Council and Toi Te Ora Public Health, and in particular their concerns about the length of the delay, the need to progress towards hearing without the evidence exchange timetable being interrupted and the possibility of mediation not be revisited at this point in the proceeding.

[33] Although I agree and acknowledge that the delay in filing the s 274 notices borders on excessive, I consider that in the context of this case it is appropriate to exercise my discretion to grant the waiver application. I reach this decision because of:

- (a) The impact proposed Rule AQ R22 may have on the businesses of the applicants;
- (b) The applicants' advice that they do not intend to raise issues that are not already before the Court; and
- (c) The applicants' acknowledgement they can be joined to this proceeding without jeopardising the timetabling directions already in place.

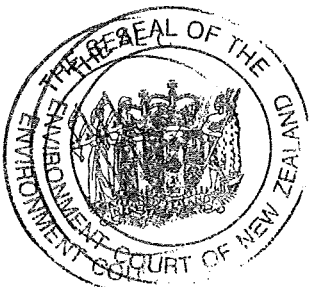
Decision

[34] The application for waiver is granted, and the applicants are joined to this appeal as parties under s 274 of the Act.

Directions

[35] The applicants are to:

- (a) Supply to the parties to this appeal a list of their proposed witnesses and areas of expertise; and
- (b) Confirm that the current allocation of 3 days hearing time is sufficient by **Friday 7 August 2020**.



[36] The applicants are to comply with the following evidence exchange timetable:

- (a) Respondent and parties in support of the Respondent to circulate and file evidence in chief by **Friday 7 August 2020**.
- (b) Appellants and parties supporting the Appellants to circulate and file evidence in chief by **Friday 21 August 2020**.
- (c) Caucusing of air quality experts to occur during week commencing **24 August 2020** and file any joint witness statements by **Friday 28 August 2020**;
- (d) Caucusing of planning experts (if required) to occur during week commencing **31 August 2020** and file any joint witness statements by **Friday 4 September 2020**;
- (e) Respondent and parties in support of the Respondent to file evidence in reply by **Friday 11 September 2020**;
- (f) Respondent to file evidence with the Court (4 copies, tabulated and paginated, with a corresponding electronic copy) by **Friday 18 September 2020**;
- (g) The matter is set down for hearing in the week of **19 October 2020**.





M J L Dickey
Environment Judge