

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2022] NZEnvC 42

IN THE MATTER of the Resource Management Act 1991

AND an appeal under s120 of the Act

BETWEEN WARWICK SUTHERLAND
WILSON

(ENV-2020-AKL-51)

Appellant

AND WAIKATO REGIONAL COUNCIL

Respondent

AND OHINAU AQUACULTURE
LIMITED

Applicant

Court: Environment Judge J J M Hassan
Sitting alone under s279(1) of the Act

Hearing: In Chambers at Christchurch

Date of Decision: 25 March 2022

Date of Issue: 25 March 2022

**DECISION OF THE ENVIRONMENT COURT
ON APPLICATION FOR WITNESS SUMMONS**

REASONS

WILSON v WRC – DECISION ON WITNESS SUMMONS



Introduction

[1] The applicant, Ohinau Aquaculture Limited (“OAL”), requests that the court issue a witness summons for the attendance of Dr Daniel Kluza, Principal Advisor (Marine) at Biosecurity New Zealand. The request is opposed by the appellant, Mr Wilson. Waikato Regional Council abides the court’s decision.

[2] Dr Kluza is an employee of the Biosecurity New Zealand Tiakiatanga Pūtaiao Aotearoa (“BioNZ”) a division of the Ministry for Primary Industry (“MPI”). In that statutory capacity, he has been in discussions on biosecurity matters with OAL representatives and counsel. Understandably, MPI is anxious to preserve its independent statutory position on any individual resource consent application. As Dr Kluza has explained to OAL, MPI’s preference is “that an independent provider supplies an evaluation of the draft Biosecurity Management Plan and the mussel rope drying experiment”.¹ However, it would respect any decision the court makes in regard to any request for a witness summons.

OAL’s request

[3] Counsel explains that Dr Kluza has had discussions with some of OAL’s expert witnesses since the court’s interim decision was issued.

[4] Counsel submit that Dr Kluza could “provide valuable insight to assist the Court on the main topic of the reconvened hearing, being biosecurity”. That is with reference to observations made in the interim decision to the effect that the court had not been informed of any engagement with relevant authorities under the Biosecurity Act 1993 (“BA”). Counsel argue that there would be benefit for the court in hearing first-hand from Dr Kluza, as an independent witness, about OAL’s engagement and correspondence with MPI on these matters. Counsel submits that this would be of substantial help for the court in understanding other

¹ Email from D Kluza to A Hill regarding Ohinau Aquaculture – EnvC Evidence (23 February 2022).

evidence in the proceedings.

[5] Counsel further elaborates that Dr Kluza could give evidence as to the following:²

- (a) BioNZ's role under the BA and the RMA;³
- (b) a brief overview of the development of marine biosecurity management in New Zealand;
- (c) a brief overview of the Government Industry Agreement (GIA), and the implications of the aquaculture sector being a party to the GIA, in order to address the question of who is responsible for, and who pays for a biosecurity incident;
- (d) an explanation of the general steps MPI would take in the event of a marine biosecurity incursion (acknowledging the specifics are context dependent);
- (e) a list of the various best practice guidelines or templates relevant to the aquaculture sector, and MPI's role in reviewing and/or co-developing those documents;
- (f) confirmation that OAL sought Dr Kluza's input regarding the rope drying experimental methodology for this application, and that Dr Kluza had discussions with Mr Cunningham and Dr Sim-Smith;
- (g) confirmation that Dr Kluza reviewed the draft Whauwhau Biosecurity Management Plan in light of the available best practice documents and whether Dr Kluza recommends any changes.

[6] OAL requests that the summons direct Dr Kluza to provide written evidence to be filed and served before the hearing commences. Counsel explains:⁴

² Memorandum of counsel for the applicant, dated 11 March 2022, at [6].

³ Resource Management Act 1991.

⁴ Memorandum of counsel for the applicant, dated 11 March 2022, at [7].

That evidence is to comprise a set of the relevant policy and operational documentation such as those referred to in... [5] ... above. A response to the issues raised in ... [5] ... above and any other information that Dr Kluza might consider that the Court ought to know, consistent with the role of an expert witness under the Code of Conduct for expert witnesses.

[7] OAL acknowledges, however, that the form in which that evidence would be given is a matter for the witness. OAL envisages that Dr Kluza would give evidence by video link.

[8] Counsel acknowledges that the discretion to issue a witness summons “should be used sparingly”, but submits:⁵

- (a) the BA and RMA are complementary and overlapping jurisdictions such that there is a need to ensure that RMA decisions “are consistent with obligations under” the BA;
- (b) with the exception of Kennedy Bay north of the Kūaotunu Peninsula and Port Charles, the spat catching farm will be the only marine farm in the eastern Coromandel; and
- (c) the court “in this case has specifically asked for evidence from MPI”.

Mr Wilson’s opposition to the request

[9] Mr Wilson points out the limits to the leave reserved to OAL in the interim decision. Counsel characterises that as allowing OAL to amend its application concerning biosecurity arrangements that the court found deficient, but did not invite OAL to repair the case it presented. In particular, counsel observes that OAL has already had opportunity to lead evidence on the broader biosecurity management matters that OAL now envisages Dr Kluza as offering assistance to the court on. Mr Williams submits that his client should not now be prejudiced by a further hearing that extends beyond the boundaries of leave set by the interim

⁵ Memorandum of counsel for the applicant, dated 11 March 2022, at [9].

decision.⁶

[10] Referring to various Environment Court decisions, counsel submits that a material factor is whether or not “the expert opinion sought to be produced would be of ‘substantial help’ to the court for the purpose of s25(1) of the Evidence Act 2006” (‘EA’).⁷

[11] Mr Williams further submits that the evidence that OAL anticipate Dr Kluza will give is not necessary and would not be of substantial help to the court. Rather, it would “simply operate to impose an additional burden on the appellant, in responding to the applicant’s attempt to repair defects in its case at the previous hearing”.⁸ He elaborates that:⁹

- (a) there are other witnesses already being called by OAL who can ‘cover the base’ and indeed do so in their evidence as exchanged on 2 March 2022, with Mr Cunningham explaining his involvement in biosecurity management plans prepared under the BA, including on behalf of MPI, and Ms Britton giving evidence on implementation of the BA as relevant to this application;
- (b) Dr Sim-Smith gives a detailed comparison of the biosecurity management plan as now appended to her evidence and the content of the various documents referred to at item (e) of the proposed scope of Dr Kluza’s brief;
- (c) the evidence sought to be produced through Dr Kluza is not confined to biosecurity management more generally, but also to address Dr Kluza’s input into the rope drying experimental methodology, which

⁶ Memorandum of counsel for the appellant, dated 18 March 2022, at [3]-[9].

⁷ Memorandum of counsel for the appellant, dated 18 March 2022, at [14], referring to *Re Palmerston North City Council* W045/2009 at [12], *Brooker v West Coast Regional Council* [2015] NZEnvC 31, at [7], *Eden Epsom Residential Protection Society v Auckland Council* [2021] NZEnvC 68, at [16] and [17], *Country Lifestyles Limited v Auckland Council* [2021] NZEnvC 182, at [12].

⁸ Memorandum of counsel for the appellant, dated 18 March 2022, at [17].

⁹ Memorandum of counsel for the appellant, dated 18 March 2022, at [16].

is again already the subject of no less than three expert statements of evidence being called by the applicant.

OAL's reply

[12] In reply, Mr Davies submits that Mr Wilson's claim that OAL seeks to repair its case misses the point of why the summons is sought.¹⁰ Counsel maintains that Dr Kluza's evidence would be of substantial help because it would address what is undertaken in regulatory terms through the BA, particularly in the management of biosecurity risks associated with aquaculture and MPI's role in that context. The evidence, if it touches on the RMA, would do so only in the context of the inter-relationship between the two Acts.

[13] Counsel submits that Dr Kluza's evidence would provide important context for the court, adding that there have been a number of developments since the first hearing in terms of managing the risk of and responding to marine pest incursions associated with aquaculture. Those have involved discussions between MPI, local Councils, consent holders and representative bodies in the aquaculture sector. Mr Davies points out that this work in regard to the management of marine pest incursions goes beyond resource consent conditions and the approach in the Biosecurity Management Plan. In certain circumstances MPI will respond (alongside or in place of the consent holder). He adds, however, in terms of regulatory consistency, the resource consent conditions would need to recognise that regulation may be imposed under the BA.

[14] Counsel adds that Dr Kluza has reviewed the Biosecurity Management Plan for this application, because the requirements in that Plan impact on his role as regulator. Again, that impact is not something that a witness called as an expert can speak to. While Ms Britton could speak to that in terms of her involvement, MPI's regulatory function is not something OAL's experts can give first-hand

¹⁰ Memorandum of counsel for OAL, dated 23 March 2022.

evidence on. Counsel also defends Dr Kluza from the challenge to his independence, noting that it is proper and consistent with MPI's statutory role for its officers to be engaged in considering particular proposals.

Statutory framework and principles

[15] The request is pursuant to s278(1), RMA and r 9.43, DCR.¹¹ That rule relevantly provides:

Issue of witness summons

- (1) A witness summons in form 27 to require the attendance of a witness at the trial to testify or to produce documents, or both, may be obtained by any party, at any time after filing the statement of claim.
- (2) A party requiring the issue of a witness summons must file a written request to obtain it.
- ...
- (4) Upon receiving a written request under this rule, the Registrar must issue the summons requested.

[16] The discretion through s278 is broad. As counsel notes, it is not confined by cases that have considered DCR r 9.43, generally in a civil litigation context. In an RMA context, there is a broader public interest overlay. That includes ensuring that the wider statutory framework pertaining to biosecurity management is properly understood insofar as it bears upon the consideration of the proposal including, if consent is confirmed, consent conditions. Another factor here is as to due process, including in ensuring all parties are fairly heard. That is in a context where our interim decision made findings as to the inadequacy of OAL's proposal for biosecurity management and granted leave to revisit this in certain respects but

¹¹ District Court Rules (2014).

not on an open-ended basis.

The leave given in our interim decision and related findings

[17] The interim decision¹² left final determination of all matters concerning biosecurity management at large and granted OAL leave to amend its proposal as follows:

[298] Leave is granted to OAL to amend its Proposal on matters concerning:

- (a) biosecurity management; and
- (b) consent conditions on that matter and on adaptive management and condition review in response to our findings on the precautionary approach.

[18] That was subject to the following related direction:

[299] That is subject to directions that, within 15 working days of the date of this decision, OAL must confer with Mr Wilson and WRC and file a memorandum of counsel proposing timetable directions as to the following:

- (a) the filing of a further memorandum setting out the amendments it proposes; and
- (b) the sequential filing of evidence on biosecurity management and any further expert conferencing;
- (c) an estimated duration for a resumed hearing on these matters.

[19] The decision includes the following relevant findings on the evidence included:

¹² *Wilson v Waikato Regional Council* [2021] NZEnvC 131.

[47] A significant issue is whether the Proposal would pose unacceptable biosecurity risks. Primarily, those are associated with the transfer of spat ropes and movement of servicing vessels to and from the Firth of Thames. Both biosecurity experts discuss these risks. For example, OAL's biosecurity expert, Dr Carina Sim-Smith, explains:

It is possible that the proposed spat farm and operations may introduce pests and diseases to the Mercury Bay Region

... The main pests of concern are the clubbed tunicate (*Styela clava*), Japanese kelp (*Undaria pinnatifida*), the Mediterranean fan worm (*Sabella spallanzanii*), the Whangamata sea squirt (*Didemnum vexillum*) and the droplet tunicate (*Eudistoma elongatum*).

... These pests are not known to be established the [sic] Mercury Bay region, though some species have been recorded from other areas of east Coromandel. ... The impacts that these pest species have on New Zealand's marine ecosystem are unknown and difficult to quantify. They have the potential to out-compete native species and can cause changes in the community composition.

Recommended mitigation methods to reduce the likelihood of new pest and disease incursions include ... Ensuring that all farm equipment used on site is new, or has been cleaned and disinfected, or left to dry on land for at least a month prior to use on the spat farm; ... Implementation of a Biosecurity Management Plan that is in accordance with biosecurity best practice.

[48] Some unsatisfactory dimensions to OAL's proposed biosecurity management were revealed in the testing of evidence. Issues include:

- (a) OAL's lack of access to sufficient land to dry the spat ropes for disinfection purposes;
- (b) a lack of clarity as to whether other arrangements for disinfection would be practicable and efficacious;
- (c) risks associated with the transportation to and from existing Coromandel farms where there are marine pests and diseases;

- (d) an impression that Mr Bull was not sufficiently familiar with, or necessarily in support of, all elements of the Biosecurity Management Plan as recommended by Dr Sim-Smith; and
- (e) related uncertainty as to the efficacy of the proposed approach and related conditions.

[49] More broadly, we were not informed of any engagement with relevant authorities under the Biosecurity Act 1993.

...

[55] Due assurance of sound biosecurity risk management is a prerequisite for any grant of consent. That is by reason of the direct ecological harm consequences that otherwise could ensue as well as consequential effects for example on natural character values. Our findings on those and other values are, therefore, qualified.

[56] However, we remain satisfied that it is sound and appropriate to leave biosecurity risk management issues aside in this interim decision as we have indicated. That is for the reasons we have indicated in terms of principles of procedural fairness and efficiency. We acknowledge the costs and inconvenience including in our likely need for further evidence. It is fair to observe that this is largely attributable to OAL's inadequate case preparation. However, we have reserved costs and, if need be, will deal with such matters in due course.

OAL's amended biosecurity management proposals

[20] OAL's amended biosecurity management proposals are as described in its supplementary evidence. I observe that OAL has not fully complied with the directions made in our interim decision. Specifically, it was required to file a memorandum giving a timetable by which a further memorandum detailing the amended proposal would be filed. Because no memoranda as to those matters is before me, I must appraise myself of the amendments to the proposal by considering the supplementary evidence itself. I have referred, in particular to:

- (a) the supplementary statement of Mr Bull on the proposed rope drying method and related trials;
- (b) the supplementary statement of Dr Sim-Smith and the additional expert evidence on the proposed rope dessication treatment; and
- (c) the supplementary statement of Ms Britton, dated 2 March 2022, as to OAL's proposed amended consent conditions.

[21] I record, however, that this omission by OAL is unsatisfactory. In particular, for our further consideration of the appeal, it is important that we have a reliable and complete statement as to what the amended proposal comprises so this is the subject of our ultimate determination. This can be simply expressed, drawing from the originally-described proposal and adding it what is changed in regard to rope drying or dessication (including where this would take place), subject to proposed conditions. I make a further direction on it in this decision so that OAL can rectify the position.

Request for witness summons is granted on a more confined basis

[22] As a courtesy to Dr Kluza, I start by recording that the court understands that his involvement in scrutinising matters pertaining to the proposal is simply as part of his statutory role as an MPI officer. It is in that independent statutory capacity, not as an expert witness, that he would be called upon to assist the court. For those reasons, I do not take up the suggestion as to the appointment of an expert to assist the court under s278(1) RMA, and DCR r 9.27. The witness summons approach would suffice for our purposes.

[23] Mr Davies' memorandum in reply appears to clarify that OAL is not seeking to have Dr Kluza address matters that are properly for OAL to address, including through expert evidence, concerning its amended biosecurity management proposal. For completeness, in terms of s25, EA, it is also unlikely that the court would be substantially assisted by expert opinion on any matter from Dr Kluza, given the several experts giving evidence before the court.

[24] As the court's interim decision records, there is a statutory inter-relationship between RMA marine or spat farming consenting and the BA, on matters of biosecurity. It is in those respects, even at this relatively late stage, that the court would be assisted by a better understanding of the responsibility and involvement of MPI as the biosecurity regulator. That is particularly given our findings as to the importance of sound biosecurity management. In particular, the court would be assisted by evidence from Dr Kluza as to BioNZ's involvement in regard to the application, in the exercise of its statutory function, and in applications of this nature more generally. It is also proper that we understand the most up-to-date position on any MPI engagement on the amended proposal.

[25] Evidence confined to those matters, by AVL, should be able to be delivered with due focus and efficiency such as to not impose unduly on other parties. In any case, matters as to costs remain reserved.

[26] It would have been open to OAL to have called evidence of this kind for the first hearing. However, I am also mindful that the important inter-relationship of the RMA and BA on biosecurity matters was not initially precisely identified as an issue to be addressed. Rather, it is crystallised by the findings in the court's interim decision. Given the nature and scope of what it is understood Dr Kluza would assist with, strictly in his capacity as an officer of MPI, I have not at this stage made directions to allow for rebuttal evidence. However, I leave capacity to seek further or amended directions by memorandum.

[27] Therefore, I issue a witness summons in the terms attached. In view of the findings in this decision, some adjustments are made to the wording of the draft witness summons provided by OAL.

Directions

[28] It is directed that:

- (a) OAL will attend to service of the witness summons on Dr Kluza, together with a copy of this decision, without delay and no later than **Wednesday 30 March 2022** and inform the Hearing Manager when this has been done;
- (b) OAL must no later than **Wednesday 30 March 2022** file a memorandum of counsel that includes a precise statement, suitable for inclusion in the court's final decision, of the proposal as now amended (leaving aside conditions); and
- (c) leave is reserved to any party to seek further (or amended) directions by memorandum following due consultation with other parties.



J J M Hassan
Environment Judge



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WILSON

(ENV-2020-AKL-51)

Appellant

AND WAIKATO REGIONAL COUNCIL

Respondent

AND OHINAU AQUACULTURE
LIMITED

Applicant

**WITNESS SUMMONS TO
ENVIRONMENT COURT HEARING
(Section 278(1) Resource Management Act 1991)**

(25 March 2022)

To: Daniel Kluza
Ministry for Primary Industries
25 The Terrace
Wellington Central
WELLINGTON 6011



[1] In your capacity as a duly-authorised officer of the Ministry of Primary Industries ('MPI'), you are ordered to attend a hearing of the Environment Court.

[2] The hearing is about a proposal to establish a mussel spat catching farm in the coastal marine area of Mercury Bay.

[3] The hearing will commence on Wednesday 4 May 2022 at 10.00 am.

[4] You are required to attend the hearing via video link (details of which will be provided to you by the court before the hearing commences).

[5] You must attend from 10.00 am on Wednesday 4 May 2022 until you are excused.

[6] To assist the court, you may prepare and, by Friday 29 April 2022, file with the Registrar (who will attend to service) a brief written statement summarising the evidence you will give, and attaching related documentation for production, which evidence may be as to any or all of the following:

- (a) Biosecurity New Zealand's role under the Biosecurity Act 1993 and the Resource Management Act 1991, including in reviewing and/or co-developing any related guidelines or other documents for biosecurity management including in resource consent application processes;
- (b) a brief overview of the Government Industry Agreement ('GIA'), and the implications of the aquaculture sector being a party to the GIA, in order to address the question of who is responsible for, and who pays for a biosecurity incident;
- (c) an explanation of the general steps MPI would take in the event of a marine biosecurity incursion (acknowledging the specifics are context dependent);
- (d) an explanation of any involvement you have had in regard to biosecurity management arrangements for the consent application

before the court, including anything you have recommended to the applicant of its advisers or consultants.

[7] This summons is issued on behalf of Ohinau Aquaculture Ltd, the applicant in the proceedings.

[8] You are entitled to receive from the applicant, witness fees, allowances, and travelling expenses (as required) according to the scale of allowances for witnesses in civil cases under the District Courts Act 2016.

[9] If you fail to attend in accordance with this summons, you commit an offence under s338(3) of the Resource Management Act 1991 and you may be liable to a fine under s339(3) of that Act.



J J M Hassan
Environment Judge

*** Endorsement of deponent**

I, _____, swear that I served Daniel Kluza with a summons by delivering the summons to him personally at _____ on _____. At the same time, I tendered that person the sum of \$ _____ for his or her allowances and travelling expenses, which that person accepted. This is a true copy of the summons.

(* Delete if summons delivered by post or no sum tendered.)

Signature of _____

deponent sworn at _____ on

before me:

Signature of _____,

Registrar (or Justice of the Peace or solicitor)

Schedule 1 Form 40: amended, on 18 October 2017, by regulation 15(1) of the Resource Management (Forms, Fees, and Procedure) Amendment Regulations 2017 (LI 2017/231).

