

**IN THE ENVIRONMENT COURT
AT AUCKLAND**

**I TE KŌTI TAIAO O AOTEAROA
KI TĀMAKI MAKĀURAU**

Decision [2023] NZEnvC 274

IN THE MATTER OF

two appeals under s 120 of the
Resource Management Act 1991 and
an application for declarations
under s 310 of the Act

BETWEEN

TE RŪNANGA O NGĀTI AWA

(ENV-2018-AKL-000133)

SUSTAINABLE OTAKIRI
INCORPORATED

(ENV-2018-AKL-000135 & 166)

Appellants

AND

BAY OF PLENTY REGIONAL
COUNCIL

WHAKATĀNE DISTRICT COUNCIL

Respondents

AND

OTAKIRI SPRINGS LIMITED

Applicant

AND

NGĀTI TŪWHARETOA (BOP)
SETTLEMENT TRUST

TE RŪNANGA O NGĀI TE RANGI IWI
TRUST

NGĀTI PIKIAO ENVIRONMENTAL
SOCIETY

TUWHAKAIRIORA O'BRIEN and
NGĀI TAMAWERA HAPŪ

KIWIRAIL LIMITED

RIHI VERCOE



s274 Parties

Court: Chief Environment Court Judge D A Kirkpatrick sitting alone under s 279(b) of the Act

Hearing: On the papers

Date of Decision: 15 December 2023

Date of Issue: 15 December 2023

**DECISION OF THE ENVIRONMENT COURT
ON PROCEDURAL MATTERS PENDING FURTHER DETERMINATION**

- A: The application for extension of stay by Otakiri Springs Limited is granted as sought, being in the terms set out in paragraph [1] of this decision.
- B: There is no order as to costs.

REASONS

- [1] Otakiri Springs Limited (**OSL**) seeks orders:
- (a) extending stay of execution of the interim decision of the Environment Court in these proceedings (the **EC interim judgment**)¹ pending determination of the Supreme Court appeals numbered SC 1/2023 and SC 2/2023;
 - (b) for associated interim relief pausing (including in terms of condition obligations, lapse and duration) the associated resource consents numbered:
 - (i) RM17-0424-DC.01 for the discharge of secondary treated wastewater to land;

¹ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196.

- (ii) RM17-0424-DC.02 for the discharge of treated stormwater and treated process wastewater to water (Hallett Drain);
 - (iii) RM17-0424-DC.03 for the discharge of sediment contaminated stormwater to water during construction;
 - (iv) RM17-0424-LC.01 for earthworks during construction; and
 - (v) RM17-0424-WT.01 for the take and use of groundwater from bores; all administered by the Bay of Plenty Regional Council and
 - (vi) 61/4/817 for the use of land for a water bottling operation; for disturbance of contaminated soil; and for excavation within 60m of the toe of the Tarawera River stopbank administered by the Whakatāne District Council;
(together the **resource consents**) granted by the Environment Court in its final decision ² (the **EC final judgment**); and
- (c) declaring:
- (i) that OSL has the right to exercise the resource consents for the terms for which they were granted, from the relevant date of commencement and factoring in any period of stay granted by this Court, notwithstanding the expiry dates specified by the Bay of Plenty Regional Council in the resource consents numbered RM17-0424-DC.01, RM17-0424-DC.02, RM17-0424-DC.03, and RM17-0424-LC.01; and
 - (ii) that advice note 4 in relation to resource consent RM17-0424- WT.01 should be read as *"five years from the commencement of the consent"*, with the relevant date of commencement factoring in any period of stay granted by this Court.

[2] The Court previously granted an application for stay of execution of the

² *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZEnvC 89.

interim decision for Creswell NZ Limited (**Creswell**).³ The rights and interests of Creswell in the resource consents have been transferred to OSL since 17 November 2023 when the Bay of Plenty Regional Council formally granted the transfer following the Supreme Court granting the application to substitute OSL as the second respondent.⁴

[3] The grounds on which the orders are sought are:

- (a) Unless the effect of the consents is paused, OSL will be disadvantaged by the delays occasioned by the ongoing legal proceedings. Creswell did not undertake any of the activities enabled by the consents prior to them being transferred to OSL. The appeals brought against the granting of the consents have had the practical effect of stopping Creswell from proceeding with the development in the face of continuing legal uncertainty. The same legal uncertainty applies to OSL and any other potential holders of the resource consents, who will not be able to proceed until the appeal are determined.
- (b) Meanwhile, some of the consents are for finite terms or are subject to finite lapse periods, and some are granted on conditions that require the consent holder to undertake actions within a specified period of the relevant consent commencing.
- (c) The resource consents require the holder to undertake various monitoring and other actions within specified timeframes from commencement which are currently unnecessary because Creswell and OSL have been unable to commence the consented activities.
- (a) The orders sought would:
 - (i) Preserve the position of all parties pending determination of the applications for leave to appeal further and any appeal,

³ *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZEnvC 94.

⁴ *Sustainable Otakiri Limited v Whatakāne District Council* SC 1/2023 and SC 2/2023 (Minute of the Court, 13 September 2023).

- if leave was granted or further order of this Court;
 - (ii) ensure that OSL is not prejudiced by the passage of time during the appeals process in terms of its ability to implement the consents as intended by the consent authorities;
 - (iii) not unduly prejudice any other person; and
 - (iv) best meet the overall justice of the case.
- (b) Bay of Plenty Regional Council and Whakatāne District Council support Creswell's application.
 - (c) Te Rūnanga o Ngāti Awa, • Sustainable Otakiri Incorporated Ngati Tuwharetoa (BOP) Settlement Trust, and Tuwhakairiora O'Brien do not oppose Creswell's application and abide the decision of the Court.
 - (d) Ngati Pikiao Environmental Society, Ngati Pikiao Environmental Society and Rihi Vercoe did not provide any response.

[4] I am satisfied that this Court has the power to makes orders of this kind under rule 30 of Supreme Court Rules 2004 relating to stays of proceedings and execution. The Court also has the procedural powers under ss 116 and 269 of RMA enabling broad action to promote the timely and cost-effective resolution of proceedings while securing interests of the applicant and the appellants.

[5] The general approach under r 30 is substantially similar to rule 12 of the Court of Appeal (Civil) Rules 2005, which requires the Court to balance the competing rights of the parties. Factors to consider in the balancing exercise include:

- (i) Whether the appeal may be rendered nugatory by the lack of a stay;
- (ii) The bona fides of the applicant as to the prosecution of the appeal;
- (iii) Whether the successful party will be injuriously affected by

the stay;

- (iv) The effect on third parties;
- (v) The novelty and importance of questions involved;
- (vi) The public interest in the proceeding;
- (vii) The overall balance of convenience; and
- (viii) the apparent strength of the appeal.

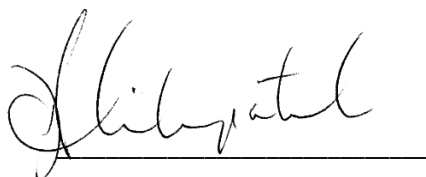
[6] I am satisfied that it is appropriate to make such orders as sought in the circumstances of these proceedings. The orders sought are a reasonable means of securing OSL's interests in its potential ability to implement and use the consents while avoiding prejudice to the interests of the appellants by securing their interests in the potential fruits of their appeals. That balance is recognised by the absence of opposition to the application.

[7] An additional consideration in relation to Supreme Court appeals is whether the party seeking the stay is likely to satisfy the criteria for leave under s 74 of the Senior Courts Act. The leave was granted by the Supreme Court on 17 April 2023.⁵

[8] I accordingly make the orders sought in the terms set out in paragraph [1] of this decision.

[9] In the circumstances where no party opposed the application, no order as to costs is sought.

For the Court:



D A Kirkpatrick
Chief Environment Court Judge

⁵ *Sustainable Otakiri Inc v Whakatāne District Council* [2023] NZSC 35.

