IN THE ENVIRONMENT COURT
WELLINGTON REGISTRY

ENV-2016-WLG-000058

Under section 274 of the Resource Management Act 1991

In the matter of the Resource Management Act 1991 of Notice of Motion under section 87G requesting the granting of resource consents to **WELLINGTON INTERNATIONAL AIRPORT LIMITED** for the Wellington International Airport Extension of Runway: Construction, Operation and Maintenance

SUBMISSIONS ON BEHALF OF GUARDIANS OF THE BAYS INCORPORATED

13 April 2018

Counsel instructed:

JGH BARRISTER

JDK Gardner-Hopkins
james@jghbarrister.com
AKL 09 889 2776
WGN 04 889 2776
M 021 277 1425

May it please the Court:

Introduction

1 By minute of 19 March 2018, the Court set the proceedings down for a judicial conference on 18 April 2018, and directed that:

> Parties who wish to be heard at the judicial conference are required to give notice to the Court accordingly and file their submissions in writing no later than 5.00pm 13 April 2018. The submissions should address (inter alia) the provisions of s279(4)(c) RMA.

2 Guardians of the Bays Incorporated (**GotB**) wishes to be heard and files these submissions accordingly. GotB had filed a memorandum dated 16 March 2018 that recorded its concerns in respect of Wellington International Airport Limited's (**WIAL**) request for an adjournment of its proceedings to a reporting date of 28 September 2018.[1] These submissions should be read in conjunction with GotB's 16 March 2018 memorandum.

3 GotB has again consulted with Hue tē Taka (**HtT**) and the Surfbreak Protection Society (**SPS**), and understands that both also strongly support GotB's submissions.

Section 279(4)(c) of the RMA – abuse of process

4 Section 279(4)(c) of the RMA states:

> An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers—
>
> (c) that it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

5 The High Court in *Hurunui Water Project Ltd v Canterbury Regional Council* [2016] NZRMA 71 at [100] stated (in different circumstances[2]) that "the threshold for establishing abuse of process is high", and that any finding of abuse of process must be based on "clear concluded findings of fact". A

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1 To allow WIAL to make progress with its application to the Director General of Civil Aviation (**Director**) for approval of its proposed Runway Safety Area Extension (**RESA**).

2 The *Hurunui* proceedings related to the withdrawal of an appeal following the filing of a consent memorandum (but before any decision of the Court following the consent memorandum).

review of the authorities confirms that the section 279(4)(c) power to strike out for abuse of process has been used sparingly.

6 Abuse of process can arise in a range of circumstances. In *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208, Randerson J equated the Environment Court's power to strike out with the way in which the High Court exercises its jurisdiction under what is now Rule 15.1 of the High Court Rules. Accordingly, guidance can also be found in the High Court authorities under that rule (or its predecessor). Often, the focus in a claim of "abuse of process" is where a litigant uses the processes of a court for an ulterior or improper purpose.[3]

7 GotB is unaware of any ulterior purpose here, although **if** the reality is that WIAL's application will ultimately need to be withdrawn and re-lodged, it is unclear why WIAL still wishes to keep its application "alive". If there is some commercial or other reason it is important for WIAL to be seen to have its application "on-foot", for example investor confidence in WIAL, then WIAL should disclose that motivation. In terms of the utility of keeping the application on foot, WIAL should at least be required to disclose what length RESA it intends to seek from the Director. If it is beyond 90m, the proceedings become futile and without utility, and it would be an abuse of process to allow them to continue.

8 In terms of the general principles, in *Otaraua Hapu v New Zealand Historic Places Trust Pouhere Taonga* [2011] BCL 171, the Environment Court found that the term "abuse of process", encompassed, in a general sense, any situation where the Court's procedures were misused in some way.[4] In *Karatea v Manawatu Wanganui Regional Council* W39/2009 at para [14], the Environment Court identified four situations where abuse of process can arise:

8.1 Court process are conducted for an ulterior purpose;

8.2 A decision will have no utility;

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3 For example, in *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA) at p 579.

4 In *Otaraua Hapu*, the Court found that where the appellant hapu failed: to attend a reconvened mediation; to file evidence in accordance with the Court's direction; and to attend the prehearing conference, constituted an abuse of the Court's process. The Court struck out the appeal.

8.3 A litigant seeks to delay other parties;

8.4 A litigant fails to comply with directions of the Court.

9 If there is no ulterior purpose then any potential abuse of process in these proceedings is likely to arise from the "delay factor" sought by WIAL (although the proceedings will have no utility if WIAL seeks, or if the Director requires, a RESA longer than 90m). While delay, particularly in breach of timetabling orders, has been raised in strike-out cases before the Environment Court, there do not appear to have been any Environment Court cases directly on this point.

10 Decisions of the High Court under what is now Rule 15.2 of the High Court rules also provide some general guidance as to principle. Under Rule 15.2 the Court may dismiss or stay a proceeding if a plaintiff has failed to prosecute all or part of its proceeding to trial and judgment. The High Court in *Lovie v Medical Assurance Society of New Zealand Ltd* [1992] NZLR 244, summarised the approach to the issues at 248:

> Turning to the principles applicable to the substantive issue, the applicant must show that the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant. Although these considerations are not necessarily exclusive, and at the end one must always stand back and have regard to the interests of justice, in this country, ever since *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58] it has been accepted that if the application is to be successful, the applicant must commence by proving the three factors listed.

11 More recently, the Court of Appeal in *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 undertook an extensive review of the authorities. The Court of Appeal recorded the summary of the principles as stated by Lord Diplock in *Birkett v James*,[5] as follows:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

12 The Court of Appeal later concluded at [99]:

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5 *Birkett v James* [1978] AC 297; [1977] 2 All ER 801.

> ... in New Zealand the overriding consideration in strike-out applications for delay has always been whether justice can be done despite that delay.

13 Distilling these considerations for the context of the present proceedings, in my submission, in the case of a potential abuse of process for delay that might warrant strike out under section 279(4), the Environment Court should consider:

13.1 whether the delay is "inordinate";

13.2 whether the delay is "inexcusable" and/or whether conduct has been "contumelious"; and

13.3 the extent of prejudice.

14 No one matter is necessarily determinative, the overall question being whether the interests of justice support a strike-out.

15 I address these matters below.

Inordinate delay

16 This is a question of fact to be resolved in the circumstances of the case[6]:

> It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs.

17 The extent of delay was addressed in GotB's memorandum of 18 March 2018. GotB made the point that if WIAL's request for an adjournment to September 2018 is granted, the application could be heard **three years** after its lodgement, and much longer since many of the relevant assessments were undertaken or data collected.

18 That might not necessarily be an inordinate delay from lodgment in the case of an appeal. However, these proceedings are first instance proceedings being heard at WIAL's request before the Environment Court. That is a

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6 *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 (CA) 260 at 268.

significant factor in terms of whether the delay to date, and potential future delay, is inordinate.

19 A further compounding factor is that WIAL can provide no certainty as to when WIAL may actually wish to proceed with its application (if it ever will). Other than the lodgment of its application to the Director (which may or may not have yet occurred[7]), the timing is largely outside of WIAL's control. The Director may wish to consult (eg with the NZALPA), obtain peer reviews of information received, seek further information from WIAL, etc. The regulatory framework applying to the Director's decision does not provide set timeframes, or substantive detail as to process.

20 There is also the prospect of any decision made by the Director being challenged again by way of judicial review. This illustrates the difficulty of proceeding with one process (the direct referral) when it is contingent on another (the Director's RESA decision). While there are sometimes other approvals required in an RMA project (eg Historic Heritage, Wildlife Act, DOC concessions), they are usually ancillary approvals. Alternatively, the applicant proceeds at their own risk that those other approvals might not be obtained – and does not put its application on hold indefinitely to secure them.

Inexcusable / contumelious conduct

21 These matters may shade together. In *Lovie*, the Court stated (focusing on the term contumelious) at [255]:

> I am not aware of any case in which the expression "contumelious" has been analysed for present purposes. Of various dictionary meanings, most closely in point are those on the lines of insulting or offensively contemptuous treatment. As a matter of semantics it may be argued that Lord Diplock had in mind conduct which was intentional (as distinct from accidental), that its effect was contumelious, and that it was unnecessary that the contumely was intended as such, but I prefer the view that the offence must be inflicted intentionally. More than unintentionally offensive conduct is required.

22 In the circumstances, WIAL's "justification" or reason for its requested further delay can be understood – it is not without foundation. For example, WIAL does not wish to put itself or other parties to further costs pending the outcome of the Director's determination. However, that does not mean the

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7 The indication given by WIAL was that it intended to lodge the application with the Director "towards the end of March".

ongoing delays will always continue to be excusable, or that WIAL's conduct might not be contumelious.

23 WIAL has been well aware of the difficulties in proceeding with its direct referral for some time – at least since the Court of Appeal's decision against the Director's decision in February 2017 (although it would have known of the potential risk from the original filing of the judicial review). The delays to date, and WIAL's continuing requests are not the result of some previously unknown risk or fact, and do not arise from an error or mistake. In that sense, they are intentional and foreseeable delays – and, for that reason, arguably inexcusable.

24 In terms of contumelious conduct, arguably, WIAL may not have treated the Court and parties with the respect they deserve. WIAL's most recent memorandum of 26 February 2018 was very cursory (just over one page of text), despite seeking a further 6 month extension. It was not accompanied by any affidavit evidence confirming the progress it had made in respect of its application to the Director, or what is intends to do to minimise further delays; which might have been expected in the circumstances. WIAL has not even confirmed what length RESA it intends to seek from the Director. Nor did WIAL volunteer any regular reporting or the provision of any other information to the Court and the parties.

Prejudice

25 A harmless delay may not warrant a strike-out. However, a delay which results in prejudice to another party may provide a basis for strike out.

26 The very fact of the ongoing proceedings is prejudicial to at least some of GotB and ThT members, the latter more particularly so given the implications for Moa Point residents. While property value is not normally "double counted" on top of environmental effects in the substantive consideration of an application, the depressive effect of an uncertain application on hold indefinitely (or so it might seem) is relevant to the question of prejudice in allowing further delays. Anxiety accompanying litigation – "the mere sword of Damocles, hanging for an unnecessary period"[8] – was acknowledged in *BNZ*

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8 As described by Lord Griffiths in *Biss v Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125 at p 1209.

v Savril as being recognised as prejudicial (although noting it would be exceptional for that in itself to justify a strike-out).

27 GotB and its members are genuinely concerned about being kept in the dark for an unknown period of time, and then, if the application is to be reactivated, being subject to tight timetabling and evidence requirements addressing new material that WIAL will have had months to develop.

28 GotB accepts, if WIAL's application is struck out (or withdrawn), then there may still be a risk of a further application being lodged and therefore ongoing "anxiety". However, GotB is of the view that being in that position, and then being able to deal with any fresh application on its merits and in light of any new assessments, is far preferable than facing the uncertainty of keeping the current proceedings on foot – **unless** there is regular reporting and a much greater transparency of information flow from WIAL.

29 The ongoing maintenance cost of having the proceedings on hold is also significant, particularly for a voluntary organisation like GotB. GotB has committed to keeping its members and the public up to date with progress. GotB maintains a core committee, an online presence, and needs to keep thinking about fundraising efforts, research proposals, and other initiatives while the application remains alive. Real people are giving up their personal time and energy because of it (and, for some, funds). They would be released from that burden if the application were withdrawn/struck out; at least until any future application were re-lodged. GotB and other parties would then be dealing with actual proposals, eg extended RESA and environmental consequences, rather than hypothetical scenarios dependent on a decision (ie the RESA length required by the Director) not yet made.

Relief sought

30 Accordingly, in light of the Court's minute of 19 March 2018, the above submissions, and GotB's earlier memorandum of 16 March 2018, GotB seeks:

30.1 **<u>If</u>** WIAL does not abandon or withdraw its application;

30.2 **<u>Then</u>** the Court strike out WIAL's direct referral proceedings;

30.3 **Unless** WIAL undertakes to the Court to keep the Court and the parties up to date with its application to the Director in a responsible and transparent manner including by:

30.3.1 disclosing to the Court and parties when it has made its application to the Director, including the length of RESA that it has asked the Director to approve; and

30.3.2 providing regular (eg end of month) reporting to the Court and parties as to progress of the application; and

30.3.3 identifying what information WIAL has provided to the Director in support of its application and making copies of that information available to the Court and parties. If any information is considered confidential, the reasons should be clearly identified by WIAL and an appropriate application made to the Court for confidentiality / the redacting of any information

30.4 **Provided that** if WIAL is seeking a RESA beyond 90m, then the direct referral proceeding be struck out.

DATED 13 April 2018

J D K Gardner-Hopkins

Counsel for Guardians of the Bays Incorporated