Before the Environment Court
at Wellington

In the Matter of	section 87G of the Resource Management Act 1991
And	
In the Matter of	the direct referral of the Application for resource consents associated with an extension to the runway by Wellington International Airport Limited (ENV-2016-WLG-00058)

Legal Submissions for
Wellington International Airport Limited

Dated: 10 December 2018

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INTRODUCTION

1. These submissions are filed on behalf of Wellington International Airport Limited (**WIA**L) in accordance with paragraph [3] of the Minute of the Environment Court dated 22 November 2018 and in advance of the judicial conference on 13 December 2018 scheduled to address:

   (a) WIAL's request for a further adjournment of these proceedings; and

   (b) the strike out applications by Guardians of the Bays Incorporated (**GOTB**), Hue tē Taka Society (**HTT**), and Jump Jet Holdings Limited (**Jump Jet**) under section 279(4)(c) (**Strike out Parties**).

Background and Requested Adjournment

2. As the Court is aware, as a result of protracted judicial review proceedings initiated by NZALPA, WIAL is seeking further consideration by the Director General of Civil Aviation (**DG**) as to an acceptable runway end safety area (**RESA**) specification at Wellington Airport as part of WIAL's proposed runway extension.

3. Accordingly WIAL lodged its further RESA application (**RESA Application**) with the DG on 30 April 2018.

4. In its Reporting Memorandum to the Court dated 31 October 2018 (**October Reporting Memorandum**) WIAL sought that the resource consent application (**RC Application**) proceedings continue to be adjourned until mid-March 2019 as the CAA had advised WIAL that it estimated that a decision would be made on the RESA Application by early March.

5. It now appears the CAA requires additional time to make a decision on the RESA Application indicating a decision would be made in 5-6 months, being April or May 2019. This is not what was communicated to WIAL by the CAA at the time of drafting the October Reporting Memorandum.

6. In these circumstances it is therefore respectfully requested that if the Court decides to adjourn the proceedings, the adjournment is made until 30 May 2019.

STRIKE OUT APPLICATIONS

7. The power under section 279(4)(c) is a statutory recognition of the Court's wider jurisdiction to prevent its own procedures from being misused to achieve a result which would be manifestly unfair or which would otherwise bring the administration of justice into disrepute.[1]

8. The Court in *Fletcher Challenge Energy Power Generation Ltd v Waikato Regional Council*[2] held that abuse of process involves using the Court process for an ulterior purpose, that is, a purpose not within the scope of such process.[3]

9. In *Coldway Installation Ltd v North Shore City Council*[4] the Court held the jurisdiction to strike out a case is to be used sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion.[5]

10. The High Court in *Hurunui Water Project Ltd v Canterbury Regional Council*[6] identified that there are two aspects that need to be stressed when considering the legitimate resort to this jurisdiction:

    (a) the jurisdiction relates to the protection of the integrity of the Court's process and the threat must be to the process of the Court which is wrongly being made use of and from which the Court must protect itself; and

    (b) a charge that a party is misusing the Court's process is a serious allegation and the threshold to establish abuse of process is a high one.[7]

11. The High Court in *Hurunui Water Project* went on to hold that a determination of abuse of process must be based on clear and concluded findings of fact and that the circumstances need to be plain and obvious.[8] It also held that in assessing whether there has been an abuse of process

[1] *Hurunui Water Project Ltd v Canterbury Regional Council* [2015] NZHC 3098 at [83]
[2] EnvC A109/98
[3] Ibid at [37]
[4] W118/96
[5] Ibid at page 3
[6] [2015] NZHC 3098
[7] Ibid at [84]
[8] Ibid at [100]

the focus must be on the actions of the parties, however the jurisdiction is not a punitive one.[9]

Are there grounds for a finding of abuse of process?

12. The threshold to establish abuse of process is high and respectfully in my submission has not been met in the present circumstances for the reasons set out below.

13. In *Karatea v Manawatu-Wanganui Regional Council*[10] the Court held that abuse of process involves (*inter alia*) a litigant misusing court processes, and can encompass situations where:[11]

    (a) Court processes are conducted for an ulterior purpose;

    (b) A decision will have no utility;

    (c) A litigant seeks to delay other parties; or

    (d) A litigant fails to comply with directions of the Court.[12]

14. While this is not an exhaustive list, it highlights that the Court's processes must be used for an improper purpose in order to establish there has been an abuse of process.

15. In this case there is no ulterior purpose for the request for adjournment and none of the other examples of an abuse of process are comparable to the present circumstances.

16. WIAL is not attempting to use the Court's process for an improper purpose but rather is seeking to preserve the investment (in cost and time) that it and the other parties have made in the process to date while a separate and very necessary statutory process is revisited in a post-Supreme Court guidance environment.

[9] Ibid at [86]
[10] W039/2009
[11] Ibid at [14]
[12] For example delay was found to amount to an abuse of process in *Kidman v Wellington City Council* [2016] NZEnvC 64 where the appellant had not responded to the Court's communications regarding timetabling, or in *Court v Dunedin City Council* [2013] NZEnvC 242, one of the section 274 parties was struck out as they failed to respond to the court's directions and were the cause of the 5 month delay in signing the consent order

17. However, the Strike out Parties assert that further delay in hearing the proceedings now amounts to an abuse of process.

Delay – Relevant Principles

18. There appears to be no Environment Court cases on strike out applications that address whether delay in hearing an application amounts to an abuse of process.

19. Counsel for GOTB and HTT has looked to decisions on Rule 15.2 of the High Court Rules[13] for guidance on principles relating to when a delay in hearing a proceeding may amount to an abuse of process, referring to the High Court decision in *Lovie v Medical Assurance Society of New Zealand Limited*[14]

20. In my submission consideration of the following *Lovie* factors provide some assistance in assessing if delay amounts to an abuse of process warranting a strike out under section 279(4) of the RMA:

    (a) whether the delay is inordinate; and

    (b) whether the delay is inexcusable; and

    (c) whether the delay causes serious prejudice.

21. However these factors are subordinate to the overall consideration which is whether it is in the overall interests of justice to continue with the proceeding.[15] This is discussed in more detail below.

22. In my submission although clearly undesirable, lengthy delays in Court proceedings are not uncommon when the need arises.[16] While the Court generally has an obligation under section 272 of the RMA to hear and determine all proceedings as soon as practicable, in the present circumstances it is not appropriate to do (as section 272 recognises may sometimes be the case) for the reasons discussed throughout these submissions.

[13] Under Rule 15.2 the Court may dismiss or stay a proceeding if a plaintiff fails to prosecute all or part of its proceeding to trail and judgment. The District Court Rules 2014 contain the same rule also at Rule 15.2.
[14] [1992] NZLR 244 at 248
[15] Ibid
[16] For example the proceedings relating to PC13 of the Mackenzie District Plan and proceedings relating to Queenstown Airport Corporation Limited's designation of Lot 6.

23. ‘As soon as practicable’ can reasonably mean when critical information on safety issues not yet available to the Court is the subject of an assessment by a Government Authority tasked with providing that assessment. In this case that Authority’s previous assessment has been the subject of judicial review and appeals to the Supreme Court. Its process was found wanting and it has had to reassess how it approaches this type of assessment.

24. In this instance, the first in the new environment, the DG was aware that there was an adjourned proceeding in this Court awaiting a critical assessment, and he advised a time frame which WIAL communicated to this Court.

25. Subsequently, the DG requested further information and then, reassembly of all the supporting information. The DG has since advised two further time estimates to complete the process. GOTB and HTT would sheet responsibility for the uncertainty in this process back to WIAL but the reality is that the DG is operating in a ‘post-Supreme Court’ environment in which CAA appears to be re-calibrating its own process through WIAL’s application.

26. WIAL was not cautioned to expect slippage. It had worked with the DG on two previous RESA approvals and numerous other issues. It genuinely believed that even in a ‘post-Supreme Court’ environment it understood the DG’s information requirements and the delays are as frustrating for it as they are for other parties.

27. While this Court is the final arbiter on safety and wellbeing, it is accepted that it cannot make a properly informed decision on runway safety without an expert assessment of from the Authority tasked with determining safety standards.

28. GOTB and HTT say that further delay for this purpose is inordinate, with undue inconvenience and prejudice to them and their members. This is the same question that confronted the Court in March – is a further adjournment in the overall interest of justice?

Inordinate Delay

29. In its Notice of Application to Strike Out counsel for GOTB and HTT asserts that there has been inordinate delay.

30. Whether the delay is inordinate depends on the facts of each case.[17]

31. In my submission while this is a first instance direct referral proceeding rather than an appeal, further delay in hearing the proceedings of 6 (or now 7.5) months in addition to the 6 month adjournment previously granted is not inordinate in the context of these particular proceedings.

32. While it is acknowledged some time has passed since lodging the RC Application, in my submission crucially the relevant physical environment has not changed in any material way and the length of the reclamation to enable the extension has not changed.

33. My instructions are that the only real change is in relation to the economic position which has in fact improved since the RC Application was first lodged making the current RC Application economic reports conservative. In any event it is standard practice for economic figures to be updated between the filing of an application and the filing of evidence.

34. In this regard it has been asserted that the RC Application is so out of date that it has become stale. In April Mr Kyle prepared a report on the various technical reports and whether the RC Application had become outdated. In the report Mr Kyle concluded:

> "*We are of the opinion that the technical reports that accompanied the assessment of environmental effects for the Project can continue to be relied upon, with any new information or updates being presented in evidence if considered necessary."*

35. Mr Kyle has reviewed his report and in response to this assertion provides an affidavit attaching the April report and stating that in his view the April report and his conclusions remain valid.

36. No evidence has yet been filed in these proceedings so the various environmental assessment reports attached to the RC Application can be updated where necessary by way of evidence and accordingly there can

[17] *McGechan on Procedure* at HR15.2.02(1)

be no issue with the Application having become stale. Additionally, as has already been agreed, there can be a longer than normal evidence exchange timetable to allow the parties sufficient time to review WIAL's evidence.

37. I also note the lengthy process to date is partially as a result of extensions to the statutory process sought by or supported by WIAL for the benefit of the other parties including volunteering to extend the submission period, agreeing to extend the timeframe for the Councils to provide their section 87F reports, and applying to extend the section 274 time period for submitters as a result of the Kaikoura earthquake that affected Wellingtonians.

38. GOTB and HTT assert that WIAL has not advanced its application to the CAA with urgency.

39. Contrary to what is being alleged by GOTB and HTT, it is in WIAL's interests that the CAA process is undertaken as quickly as possible, so if possible, the RC Application can be considered.

40. While WIAL initially indicated its application to the CAA would lodged by the end of March 2018, its preparation took a month longer than this initial indication. However, it is considered this is reasonable given the input required from a number external consultants in relation to complex aviation matters and WIAL's own interpretation of the Supreme Court decision. In any event the RESA Application was lodged with the CAA by the 30 April 2018 deadline in the Court's 19th Minute.

41. As discussed above, it then took some time for the CAA to be satisfied as to the information required in light of its interpretation of the Supreme Court decision. WIAL responded to the CAA requests as quickly as possible in the context of the technical and complex nature of the information required.

42. It has also been asserted[18] that there may be further delays. As noted earlier, it now appears the DG may require additional time to make his decision which has resulted in WIAL's request to extend the adjournment until the end of May. It is acknowledged the DG may not make his decision

[18] GOTB and HTT Notice of Application to Strike Out dated 9 November 2018 at [5]

in this timeframe, however this is not a matter within WIAL's control and there is no present indication of that.

43. The affidavits of Ms Rottman and Mr Shanks state that at the last judicial conference I said it would be the last time WIAL would ask for an extension of the Court proceedings. I do not recall saying this and notes taken by Mr Gordon do not record this statement. If however I did then it was my honestly held belief at the time on the basis that it was not anticipated that the CAA process would take as long as it has.

Inexcusable

44. *McGechan on Procedure*[19] notes that this requirement recognises that delay, even significant delay, is sometimes excusable and comments that awaiting the results of a related proceeding is an explanation of significant delay that is acceptable.

45. In my submission the delay in these proceedings is clearly not inexcusable. The further adjournment has been sought as a decision has yet to be made by the DG in relation to the RESA Application. For the same reasons the first adjournment was sought, WIAL does not want to put the Court or the parties to further expense while this separate but necessary and related process occurs. In my submission this was self-evident from the October Reporting Memorandum and further evidence as to why the extension was required was or is not necessary.

46. GOTB and HTT allege the delay is inexcusable given WIAL's knowledge of the risks of delay when it lodged the RC Application.[20] This matter was raised at the last adjournment application. Acknowledging that while WIAL filed the RC Application in the knowledge the DG's decision was under challenge, it did so recognising the Councils would take some time to review the RC Application[21] before the general public became involved and with the intention that if a negative decision was received from the High Court then WIAL would have to put the RC Application on hold. Following the positive High Court decision WIAL continued with its RC Application. In order to avoid wasting both the Court's and parties time and resources

[19] *McGechan on Procedure* at HR15.2.03
[20] GOTB and HTT Notice of Application to Strike Out dated 9 November 2018 and GOTB and HTT Legal Submissions dated 3 December 2018 at [12]
[21] WIAL was responsible for the Councils processing fees of the Application

WIAL sought appropriate adjournments of the proceedings following the Court of Appeal decision and beyond.

Serious Prejudice

47. GOTB, HTT and Jump Jet must show they will be seriously prejudiced by the delay.[22] While WIAL acknowledges the concerns raised in the affidavits filed in support of GOTB and HTT and Jump Jet's applications for strike out, in my submission the further delay will not cause serious prejudice to those parties.

48. It is acknowledged this RC Application has been a drawn out process to date, however WIAL considers it is in every parties' interests to pursue the current application.

49. I am instructed that should these proceedings be struck out WIAL will reapply once the DG's approval is known and RESAs can reasonable be accommodated within the scope of the RC Application and WIAL's existing landholding.

50. Therefore the stress and worry said to be being felt by some residents will likely continue. As the Court observed in March, the sword of Damocles will remain over the opponents to the application. They will be no better off if the RC Application is terminated. Indeed they will likely be worse off by having to re-take steps to lodge submissions to ensure they are able to be heard.

51. While GOTB and HTT submit that is a better position to be in, WIAL considers it is a more efficient use of resources for all parties to pursue the current RC Application if that is made possible as a result of the DG's decision. In my submission continuing with the RC Application will preserve the financial and time investment that WIAL and the other parties have made in the process to date while a separate and very necessary statutory process is revisited. There will be no further costs to other parties during the adjournment period other than those relating to any requested reporting as to the progress of the CAA process.

[22] *Lovie v Medical Assurance Society of New Zealand Ltd* [1992] 2 NZLR 244 at page 248

52. To strike out these proceedings and start the resource consent process again, would elongate the process further, continuing the uncertainty felt by some residents and increasing the costs involved.

53. GOTB and HTT contend that the delays are prejudicial to all section 274 parties. While GOTB and HTT represents a number of submitters they do not speak for the significant number of other section 274 parties both in support and opposition of the RC Application that have not raised any issue with the requested adjournment.

54. In the 19th Minute of the Court, the Court indicated that it will require the consent authorities to give public notice that the RC Application will proceed to a hearing and provide an opportunity for persons who have not yet joined the proceedings to do so. This will ensure that any persons who have moved into the area are aware of the RC Application and are given an opportunity to join the appeal, which resolves any prejudice to those parties.

55. Additionally, in the 19th Minute of the Court also confirmed it will allow section 274 parties "generous time" for them to review the information to be advanced by WIAL in support of its proposal and approach which WIAL supports.

56. Jump Jet submits that any further extension will create increasing uncertainty regarding Jump Jet's application for an Air Operator Certificate. It is not clear what relevance the RC Application has on Jump Jet's application for an Air Operator Certificate and in my submission any uncertainty arising from a further adjournment cannot amount to serious prejudice.

57. Counsel also notes a large number of the matters raised in the affidavits of the Strike out Parties relate to those persons' views on the substantive consideration of the RC Application rather than to any prejudice suffered by the parties as a result of the further adjournment of the proceedings.

58. In particular, with respect, the reasons given by Jump Jet in its submissions supporting its strike out application relate to the decision to be made by the CAA and clearly this is not the appropriate forum to be addressing those concerns.

59. Accordingly, in my submission the Strike out Parties have failed to demonstrate they would be seriously prejudiced by the delay in hearing the proceedings.

What is in the Overall Interests of Justice

60. The general duty under section 21 of the RMA to avoid unreasonable delay however the overall principle applying to an adjournment application is whether it is in the interests of overall justice.[23]

61. In my submission, in the present circumstances the adjournment is in the interests of overall justice and the delay is not unreasonable for the following reasons:

    (a) The RESA Application put forward to the CAA has not changed in any relevant material way and continues to provide for RESA options that can be accommodated within the overall scope of the RC Application and utilising existing WIAL land;

    (b) The adjournment will enable the DG to provide his view as to the acceptability of the RESA specification put forward by WIAL as part of the RESA Application which, depending on the outcome, could enable the present RC Application to proceed to a hearing;

    (c) WIAL has invested significant time, cost and resources in the preparation and processing of the current RC Application. The submitters and parties to this proceeding have also invested their time and resources to participate;

    (d) Those resources could still be utilised if the DG approves a RESA length that can be accommodated within the scope of the current RC Application as part of the runway extension;

    (e) No evidence has been exchanged so there is no prejudice to parties in terms of costs to prepare evidence or evidence becoming stale; and

    (f) WIAL will continue to report on a monthly basis so that the Court and the parties are aware of how the CAA process is progressing.

[23] *Director-General of Conservation v Waikato Regional Council* EnvC A232/02 at [16]

62. In my submission, for the reasons set out above continuing with the proceeding by granting an adjournment is in the overall interests of justice.

CONCLUSION

63. The threshold to make a finding of abuse of process is high and needs to be based on clear and concluded findings of fact. In my submission the Strike out Parties have not met this high threshold and there are insufficient grounds to establish a finding that the requested adjournment is an abuse of process. In my submission the applications by GOTB, HTT and Jump Jet should be dismissed.

64. An adjournment will preserve the investment already made by all parties and not incur any additional cost while the DG considers WIAL's RESA Application. If in the event the DG accepts a RESA specification that is within the reach of the current RC Application then these proceedings can continue. If not then WIAL will withdraw it.

65. Yes, the delays are unusual and undesirable but they flow from a different process which has had to be re-started in order to ensure that the best possible information on runway safety is properly before the Court.

66. As such, WIAL considers the granting of a continued adjournment until 30 May 2019 is reasonable and in the interests of overall justice.

Dated: 10 December 2018

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Amanda Dewar

Solicitor for Wellington International Airport Limited