

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA439/2017
[2017] NZCA 377**

BETWEEN BROOK VALLEY COMMUNITY
 GROUP INCORPORATED
 Appellant

AND THE BROOK WAIMARAMA
 SANCTUARY TRUST
 First Respondent

 THE MINISTER FOR THE
 ENVIRONMENT
 Second Respondent

 NELSON CITY COUNCIL
 Third Respondent

Hearing: 24 August 2017

Court: Winkelmann, Asher and Clifford JJ

Counsel: S J Grey for Appellant
 S Galbreath for First Respondent
 C Lenihan and R Polaschek for Second Respondent
 R Ennor for Third Respondent

Judgment: 31 August 2017 at 2:30pm

JUDGMENT OF THE COURT

- A The application for a stay and interim relief is declined.**
- B Costs are reserved pending the determination of the substantive appeal.**
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REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant Brook Valley Community Group Inc (the Community Group) in judicial review proceedings sought declarations aimed at preventing the first respondent, The Brook Waimarama Sanctuary Trust (the Trust), from carrying out an aerial drop of poison baits on a wildlife sanctuary managed by the Trust. After a hearing on 26 and 27 July 2017, Churchman J, in a judgment delivered on 4 August 2017, refused to make any of the declarations sought by the Community Group.¹

[2] That decision has been appealed to this Court. In the High Court the Community Group sought a stay of the decision and interim relief preventing the proposed aerial drop from proceeding pending the outcome of the appeal. In a judgment delivered on 15 August 2017 Churchman J declined to make a stay order or grant any interim relief.² The Community Group has now on short notice applied to this Court for a stay of execution of the High Court judgment and the grant of interim relief preventing the Trust from commencing the proposed drop. There has been an urgent hearing of that application which we now determine.

Background

[3] The Trust is developing and will operate a bird and other wildlife sanctuary in the Brook Valley, known as the Brook Waimarama Sanctuary on land the Trust leases from the third respondent, the Nelson City Council (the Council). The sanctuary, of some 711 hectares of public land, is surrounded by a predator proof fence and is covered by native bush. It is home to a number of native birds and mammalian pest species. Adjacent to the sanctuary is the Council-owned Dun Mountain Railway Walkway and the Brook Reserve, as well as private farmland owned by various persons, some of whom are involved in the Community Group. The aerial drop the Trust intends to conduct is of the poison brodifacoum.

¹ *Brook Valley Community Group Inc v The Trustees of the Brook Waimarama Sanctuary Trust* [2017] NZHC 1844.

² *Brook Valley Community Group Inc v The Brook Waimarama Sanctuary Trust* [2017] NZHC 1947.

[4] On 11 May 2016 a resource consent was granted by the Council permitting the Trust to carry out a series of aerial brodifacoum drops, subject to 47 conditions. Then on 20 February 2017 regulations were made by Order in Council under s 360(1)(h) of the Resource Management Act 1991 (the RMA) following a recommendation by the Parliamentary Commissioner for the Environment in 2011 and consultation with interested parties, including The Royal Forest and Bird Protection Society of New Zealand. Regulation 5 of the Resource Management (Exemption) Regulations 2017 (the Regulations), as amended on 2 June 2017, provides that the discharge of the RMA contaminant brodifacoum is exempt from s 15 of the RMA if the discharge complies with the Regulations. As a consequence, on 9 May 2017, the Trust notified the Council of a wish to surrender, and the Council approved the part surrender of the Trust's resource consent as it related to the aerial discharge of brodifacoum and cancelled the conditions previously imposed.

[5] The Trust was intending and still intends to carry out the aerial drop, relying on the authority of the Regulations. The intention is to kill mice, ship rats and Norway rats. A total of 26.5 tonnes in mass will be dropped, and steps will be taken to deter birds from consuming it. The drop is intended to cover the entire sanctuary area subject to a zone which is to be hand baited. The goal is to create a pest-free sanctuary.

[6] The Community Group issued the judicial review proceedings within weeks of the Regulations being enacted. The Community Group argues that the Regulations are unlawful and that the exemptions under the Regulations apply only to s 15 of the RMA. A declaration is sought that s 13(1)(d) of the RMA prohibits the aerial broadcast of brodifacoum and other poison baits in the area. A declaration is also sought that a provision in the Nelson Resource Management Plan prohibits the aerial broadcast of brodifacoum and other toxic baits in certain circumstances that apply in this case, and that if the Regulations were lawful various requirements have not been met.

[7] The appeal was filed shortly after the release of Churchman J's substantive decision. As we have said there has been an application for a stay and interim orders in the High Court which were declined by Churchman J on 15 August 2017. He

found that there were insufficient grounds to grant the stay and the interim relief. He observed:³

To [grant relief] would deny the respondents the fruits of the litigation and would cause irreparable harm to the first respondent's interests. The applicant's position in the appeal will not be rendered nugatory by the refusal to grant a stay.

Rule 12(3) of the Court of Appeal (Civil) Rules 2005

[8] Rule 12(1) and (2) of the Court of Appeal (Civil) Rules 2005 state that an appeal does not operate as a stay of execution. Rule 12(3) and (4) provide:

- (3) Pending the determination of an application for leave to appeal or an appeal, the court appealed from or the Court may, on application,—
 - (a) order a stay of the proceeding in which the decision was given or a stay of the execution of the decision; or
 - (b) grant any interim relief.
- (4) An order or a grant under subclause (3) may—
 - (a) relate to execution of the whole or part of the decision or to a particular form of execution;
 - (b) be subject to any conditions that the court appealed from or the Court thinks fit, including conditions relating to security for costs.

[9] Rule 12(3) therefore gives this Court jurisdiction to grant not only a stay of execution but also interim relief. We are satisfied that there is jurisdiction to make either of the orders now sought by the Community Group. A party is able to seek more than just a stay simpliciter. In cases like the present there is explicit jurisdiction for the Court of Appeal to make an affirmative order in the nature of an interim injunction holding or protecting a position pending an appeal.

[10] The Community Group seeks an interim order that the Trust not proceed with the proposed aerial drop of the poison until further order of the Court. Rule 12 does not set out any criteria for the granting of a stay or interim relief, but the approach is well-established. As a starting point, a successful party is entitled to the fruits of its judgment. An appellant who seeks to stop this must make an application and show

³ At [23].

why the usual consequences of a judgment should not follow. The court will need to balance the competing rights of the party who has obtained judgment against the need to preserve the appellant's position in the event of the appeal succeeding.⁴ The factors to be taken into account in the balancing exercise when a stay or interim order are sought include:⁵

- (a) whether the appeal may be rendered nugatory by the lack of a stay;
- (b) the bona fides of the appellant as to the prosecution of the appeal;
- (c) whether the successful party will be injuriously affected by the stay;
- (d) the effect on third parties;
- (e) the novelty and importance of questions involved;
- (f) the public interest in the proceeding;
- (g) the overall balance of convenience; and
- (h) the apparent strength of the appeal.

[11] When interim relief is sought in addition to a stay, an appellant is seeking more than the prevention of the execution of the judgment. Generally the relief that is sought is the same, at least in part, as that denied in the substantive judgment which is appealed. The balancing that is involved in considering the entitlement to the consequences of success against the need to preserve an appellant's position, has similarities to that which arises when an interim injunction is sought. An appellant seeks interim orders which will have the effect of preventing or directing future events. The appellant's prospects of success on appeal are a factor, as is the balance

⁴ *Duncan v Osborne Buildings Ltd* (1992) 6 PRNZ 85 (CA) at 87.

⁵ See *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC) at [9], upheld on appeal in *Dymoocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (CA). See also *Keung v GBR Investments Ltd* [2010] NZCA 396, [2012] NZAR 17 at [11].

of convenience as it is understood in the interim injunction context, as well as the overall justice of the case.⁶

The merits of the appeal

[12] The appeal raises issues of interpretation relating to important sections of the RMA including the relationship between ss 13(1)(d) and 15 of the RMA. We have had no detailed argument on those substantive issues, which include questions of statutory interpretation which are not straightforward. While we are unable to express any view on the strengths of the arguments, we do not accept the submission of the respondents that the appeal stands no reasonable prospect of success. We go no further than saying that there are in our view issues that will be open to argument.

Bona fides and the public interest

[13] There is no doubt about the bona fides of the Community Group and the strength of its concerns. We accept that given potential effects on the surrounding community, there is a public interest element in the Community Group's application. The Group's members have concerns about the effect of the drop on the environment. Nevertheless, many members of the group have a personal interest in stopping actions that they believe will cause adverse effects to them and the enjoyment of their properties. The position of the Community Group and its members is different from that of, say, The Royal Forest and Bird Protection Society, which has no connection with local property owners. The Society in fact did appear in the High Court as an intervener and opposed the Community Group's proceedings.

[14] The Trust has, if anything, a stronger claim to the public interest than the Community Group. It has over 360 members who pay annual subscription fees. Volunteers provide approximately 35,000 hours of voluntary assistance each year to the Trust. During construction of the fence individuals and companies provided labour and sponsored materials. The purpose of the Trust is to establish a pest-free

⁶ See for example *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA) at 142.

sanctuary where lost species can be re-introduced and existing species preserved, a goal that is in the public interest.

Will the appeal be rendered nugatory?

[15] We accept that if no interim relief is granted, the aerial drop is likely to proceed within a short timeframe. The drop that the Community Group's proceeding has been designed to stop will have taken place by the time the substantive appeal is determined.

[16] That does not mean that the proceeding will be rendered nugatory if no relief is given. The Community Group is appealing the entire decision of Churchman J. We agree with Churchman J's conclusion that the right of appeal and relief sought will have value for the Community Group even if the current proposed drop proceeded as planned.⁷ The proceeding involves a general challenge to the validity of the Regulations. Success will mean that the Trust will not be able to proceed with further action using poisons without obtaining some new form of legal authorisation. It cannot be said therefore that the right of appeal will be rendered entirely nugatory should the proposed drop proceed as planned.

Impacts on the respondent

[17] It is clear that timing is important for the planned operation. Affidavits filed by the respondents show that if the Trust is unable to drop in winter when conditions are suited to an effective drop, there will be direct costs of \$127,000 plus GST. There will also be delay in the development of the sanctuary, and loss of the anticipated revenue stream which would otherwise offset annual operational costs of \$590,000. There will also be general damage to the morale of the Trust's volunteer and sponsor support base. We can readily see that an order of this Court directing that there should be no drop could have a serious adverse effect on the Trust, in that interest in and financial support for the project may wane if the drop is delayed. It is possible that this loss of support would make the delayed drop financially unfeasible. We therefore accept the submission for the respondents that the result of the

⁷ *Brook Valley Community Group Inc v The Brook Waimarama Sanctuary Trust*, above n 2, at [17].

application for a stay and interim orders may have the consequence of improving the Community Group's position, rather than merely preserving it.

[18] It also seems that conditions at the moment are suited to a poison drop. It is not certain that in 2018 winter conditions would be the same.

[19] There is force in the submission for the respondents that the orders sought would in fact defeat the purpose of the procedure followed after the filing of the Community Group's proceedings in the High Court. The parties co-operated to obtain an urgent fixture prior to the end of winter so that issues could be determined before it was too late for a drop should the claim fail. It appears that the Trust agreed to an urgent hearing so that it would not be prevented from carrying out the operation in 2017, assuming it was successful. The claim has failed, but now the Community Group seeks an interim order preventing the Trust from proceeding with the drop until the appeal is determined, which will effectively prevent the drop from taking place in 2017.

[20] The losses to the Trust if the appeal is dismissed will not be easily calculated in a monetary award of damages. There is no undertaking as to damages provided by the Community Group. Ms Grey submits, in response to this criticism of the application, that it should be recognised that the Community Group has limited financial resources, and its members are persons of ordinary means. However, we note that some of the members of the Group are landowners and we are not satisfied that a meaningful undertaking could not be provided if there was a willingness of a member or members of the Community Group to give it. The non-provision of the undertaking is perhaps understandable, but it is a significant factor working against the granting of interim relief. We consider that if interim relief is granted, and the appeal is unsuccessful, the Trust will be unable to obtain compensation for its losses.

Overall assessment

[21] The parties agreed to an urgent fixture in the High Court so that the lawfulness of the proposed drop could be determined expeditiously. The Community Group has lost at first instance. In our view the Trust is entitled to the fruits of its judgment. The fact that an appeal may be rendered nugatory or in this

case partially nugatory without a stay is not in itself a basis for granting a stay. The effect of the orders sought will be not just to preserve the position; it will be to improve it at the Trust's cost. Although there is no explicit requirement for an undertaking as to damages in r 12, the unavailability of an undertaking in this case is a significant factor, working against the making of an order. There are other factors also, in particular the fact that the Trust is a charity endeavouring to work in the public interest, and which may be seriously damaged by a year's forced delay.

[22] We consider that despite the genuine issues to be argued on appeal, the balance of convenience and overall justice of the case tip the balance in favour of declining this application.

Result

[23] The application for a stay and interim relief is declined.

[24] We recognise that there are public interests on both sides of this dispute. In the circumstances we reserve costs pending the determination of the substantive appeal.

Solicitors:
Duncan Cotterill, Nelson for First Respondent
Crown Law Office, Wellington for Second Respondent