IN THE COURT OF APPEAL
I TE KOTI PIRA O AOTEAROA

CA /2018

BETWEEN	**The Taranaki-Whanganui Conservation Board** Cross-Applicant
A N D	**Trans-Tasman Resources Ltd** Applicant
A N D	**Cloudy Bay Clams Ltd, Fisheries Inshore Ltd, Kiwis against Seabed Mining Inc, New Zealand Federation of Commercial Fishermen Inc, Southern Insure Fisheries Management Group Ltd, Te Ohu Kai Moana Trustee Ltd, Te Ohu Kai Moana Trustee Ltd, Te Runanga O Ngati Ruanui Trust, The Royal Forest and Bird Protection Society of NZ Inc** and **The Trustees of Te Kahui O Rauru** First Respondent
A N D	**Environmental Protection Authority** Second Respondent

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Application by the Taranaki-Whanganui Conservation Board for Leave to Bring Civil Cross Appeal

Dated: 5 October 2018

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TJC-952342-10-14-1

Application by the Taranaki-Whanganui Conservation Board for Leave to Bring Civil Cross Appeal

APPLICATION FOR LEAVE TO BRING CIVIL CROSS APPEAL

TO: The Registrar of the Court of Appeal

AND TO: The applicant

AND TO: The Respondents

Notice of application for leave to cross-appeal

1. Trans-Tasman Resources Limited ("**Applicant**") gave notice on 20 September 2018 of its intention to apply for leave to appeal to the Court of Appeal against the decision of the High Court in *Taranaki-Whanganui Conservation Board and others v Environmental Protection Auth*ority [2018] NZHC 2217 delivered by Justice Churchman on 28 August 2018 ("**Judgment**").

2. The Applicant served notice of its application for leave to appeal on the Respondents on 21 September 2018.

3. The Judgment quashed the consents granted by the Environmental Protection Authority ("**EPA**"), through its Decision Making Committee ("**DMC**"), to the Applicant for iron sand mining in an area of the South Taranaki Bight.

4. The Taranaki-Whanganui Conservation Board ("**Board**") is seeking, should leave be granted to the Applicant to appeal, to cross-appeal against the parts of the Judgment relating to the following matters, and as set out more particularly in the Board's grounds of cross-appeal recorded below:

   (a) The High Court's erroneous approach to the purpose of the EEZ Act, including:

(i) its failure to make a thoroughgoing attempt to reconcile the sustainable management component of the EEZ Act's purpose with the RMA's sustainable management purpose, including at [96]; and

(ii) its failure to achieve the directive of the protect from pollution component of the EEZ Act's purpose, including at [102], [397]-[398].

("**purpose errors**")

(b) The High Court erred in its approach to the information principles including at [266] and further erred in failing, including at [300], to determine that the application should have been declined on the basis of inadequate information ("**inadequate information error**");

(c) The High Court's erroneous approach to the statutory requirements in respect of the "best available information" including its failure to find that:

(i) the EPA/DMC erred in adopting a "sufficient information" rather than a "best available" approach, at [274]; and

(ii) the EPA/DMC failed to provide adequate reasons for its finding that it has the "best available information" in respect of important issues, at [292]-[293].

("**best information errors**")

(d) The High Court's failure to find that the EPA/DMC erred in failing to understand the *nature and effect* of the RMA/NZCPS marine management regime, before taking it into account, including at [153]-[162] ("**RMA/NZCPS nature and effect error**").

5. The more particular grounds of appeal are that the High Court erred in the Judgment as follows.

GROUNDS OF CROSS-APPEAL

Purpose errors

6. The High Court misinterpreted the statutory purpose of the EEZ Act and erred in its findings that the EPA / DMC correctly interpreted and applied that purpose, including in respect of the following:

   (a) In finding, at [96], that there is a "significant difference" in the definition of sustainable management in section 10(2) of the EEZ Act, and the definition of the same words in section 5(2) of the RMA, when:

      (i) the original sustainable management purpose of the EEZ Act was purposefully amended through the progress of the EEZ Bill to align with the sustainable management purpose of the RMA;

      (ii) the differences in the definition of "environment" between the Acts, upon which the High Court based its finding of a "significant difference", simply reflect the fact that the environment beyond the coastal marine area (**CMA**) is not populated by people and communities, nor, for the most part, physical infrastructure, rather than

signaling a different approach to be taken to sustainable management; and

(iii) the purpose of the EEZ Act and the purpose of the RMA are intended to ensure integrated management of the *effects* of activities on the environment irrespective of the boundary line between the exclusive economic zone (**EEZ**) and the CMA.

("**sustainable management error**")

(b) In finding, in the context of a marine discharge consent: at [102] that the protect from pollution purpose does not override the sustainable management purpose; at [397] that "[t]hose two purposes sit uneasily one with the other"; and at [398] that the protect from pollution purpose and the sustainable management purpose were both of "equal value", when:

(i) the Act only has one purpose, not two;

(ii) the protect from pollution part of the Act's purpose was introduced into the Act at the same time as the marine discharge consent regime was introduced;

(iii) the primacy of the protect from pollution directive in the Act's purpose in the context of a marine discharge consent is reinforced by the prohibition on an adaptive management approach to marine discharges, which was introduced at the same time as the marine discharge consent regime;

(iv) if the protect from pollution directive does not have primacy within the purpose of the Act over the sustainable management part of the purpose, it must be read together with the sustainable management component as a bottom line requirement to "protect the environment from pollution"; and

(v) accordingly, before granting any marine discharge consent the decision-maker must be satisfied that the grant of consent will achieve sustainable management while protecting the environment from pollution, through avoiding, remedying or mitigating effects (but without applying an adaptive management regime) or refusing consent.

("**protect from pollution error**")

Inadequate information error

7. The High Court erred in its approach to the purpose of the information principles in finding at [266] that "[t]hey seem to be designed to facilitate the making of consents where the absence of hard information might otherwise mean no consents would be granted". This is the reverse of what the information principles were intended to achieve, which was to be precautionary and ensure that consents are only granted where there is adequate information, and that information supports the grant of consent.

8. The High Court further erred in failing to address the question at [300] of whether there was inadequate information to determine the application, when the only true and reasonable conclusion is that the application

must have been refused on the basis of inadequate information given that:

(a) the EEZ Act under section 62(2) imposes a duty on the decision maker to consider whether it has adequate information to determine an application for marine consent;

(b) that duty is reinforced by the information principles, including the requirement for the decision maker to:

  (i) make full use of its powers to obtain further information, as it must base its decision on the best available information; and

  (ii) favour caution and environmental protection where the information available is uncertain or inadequate; and

  (iii) not, in the context of a marine discharge consent, apply an adaptive management approach;

(c) that duty is further reinforced by the onus of proof lying on the applicant to prove their case; and

(d) the best available information may still be uncertain or inadequate;

(e) the DMC did not have adequate information before it to determine the application, including in respect of the baseline which the High Court found, at [405], that there was "real doubt" as to whether there was "sufficient baseline information so that appropriate conditions can be drafted"; and

(f) accordingly, the requirement to favour caution and environmental protection required the application to be refused.

Best available information errors

9. The High Court misinterpreted the information requirements under the EEZ Act and erred in its findings that the EPA / DMC correctly interpreted and applied hose requirements, including by:

   (a) in failing to find, at [274], that the EPA/DMC erred in adopting a standard of "sufficient information" rather than the required standard of "best available information"; and

   (b) in failing to find, at [292]-[293], that the DMC had not explained the intellectual route taken to deciding that further information could not be obtained without undue cost, effort or time, when the reasons were not "evident without express reference" to reasons.

RMA/NZCPS nature and effect error

10. The High Court erred in finding that the DMC / EPA did not fail to take into account the *nature and effect* of the RMA marine management regime and the New Zealand Coastal Policy Statement (**NZCPS**) under that regime, and/or erred in identifying what that obligation entailed, given:

   (a) the High Court failed to recognise that the sustainable management purpose of the EEZ Act was intended to align with the sustainable purpose of the RMA, emphasising the importance of the integrated management of effects across the two regimes;

(b) the statutory requirement is to take into account "the nature and effect" of the RMA/NZCPS marine management regime;

(c) that requires, as the first step, understanding:

(i) the nature; and

(ii) the effect;

of the RMA/NZCPS marine management regime;

(d) understanding the *nature* of the regime required an analysis of the key legislative provisions, including:

(i) the sustainable management purposes of both the RMA and the EEZ Act and reconciling them despite their differences given that:

(1) the EEZ Act's purpose was deliberately aligned with the sustainable management purpose of the RMA;

(2) there is a need to ensure integrated decision making, so as to avoid – without very good reason – completely different outcomes depending on which side of the EEZ ad CMA boundary line an activity is being proposed; and

(3) in the context of this application, the majority of effects will occur in the CMA rather than the EEZ;

(ii) the fact that while the requirement under the RMA is to "have regard to" the relevant planning instrument (similar to the requirement to the "take into account" requirement under the EEZ Act), the Court of Appeal in *R J Davidson* has confirmed that a decision to subvert a clearly relevant restriction in the NZCPS would be contrary to *NZ King Salmon* and "expose the consent authority to being overturned on appeal".

(e) understanding the *effect* of the regime, which would require, in the context of these proceedings, the declining of any consents required under the RMA.

The questions of law

11. The cross-appeal raises the following questions of law:

(a) Is there a "significant difference" in the directive to achieve sustainable management under the EEZ Act and the RMA?

(b) Does the protect from pollution directive in the EEZ Act's purpose, in the context of a marine discharge consent:

(i) Override or have primacy over the sustainable management component of the purpose?; and/or

(ii) Provide a directive bottom line requirement to protect the environment from pollution?; and/or

(iii) Need to be achieved at the same time as achieving the sustainable management component of the purpose?

(c) Are the information principles designed to facilitate the granting of consents in the absence of information, or are they intended to be precautionary and ensure that consents are only granted where there is adequate information, and that information supports the grant of consent?

(d) Was the only true and reasonable conclusion that the application must be refused on the basis of inadequate information?

(e) Did the EPA/DMC adopt an erroneous standard of "sufficient information" rather than rather than the required standard of "best available information"?

(f) Did the EPA/DMC give sufficient reasons in respect of its finding that it had the "best available information"?

(g) Did the requirement to take into account the nature and effect of the RMA/NZCPS marine management regime require the DMC/EPA, in the circumstances, to carefully identify the:

(i) nature; and

(ii) effect;

of the RMA/NZCPS marine management regime, including by reference to likely outcomes under the RMA/NZCPS, before deciding what weight to give that regime?

General and public importance

12. The Court of Appeal should grant the Conservation Board leave to cross-appeal because the questions of law in its cross appeal are of general and public importance.

13. In particular:

    (a) the questions relate to the proper interpretation of a term, direction, or requirement under the Act, which has not been the subject of determination by this Court;

    (b) the determination by this Court of the proper interpretation, direction, or requirement will be of relevance to any future marine consent applications made under the Act.

14. In addition, the questions of law are capable of bona fide and serious argument and involve a matter of public interest of significant importance sufficient to outweigh the cost and delay of further appeal. The applicant for consent has itself sought leave to appeal and granting leave for the additional questions as sought by the Conservation Board will not materially add to the cost or delay.

Relief sought

15. If leave is granted to appeal, the Applicant seeks the following judgment from the Court of Appeal:

    (a) that the cross-appeal is allowed, and the judgment of the High Court is confirmed on the grounds in the cross-appeal;

    (b) if the Court finds that there was inadequate information, including insufficient baseline information, and / or that the application did not achieve the protect from pollution directive,

or suffers from any other fatal flaw, then it quash the consent without referral back to the EPA / DMC for reconsideration;

(c) costs; and

(d) any other relief the Court sees fit.

16. The Conservation Board is not legally aided.

DATED 5 October 2018

DM Fraundorfer

Solicitor for the Conservation Board

The Conservation Board's address for service is C/- James Gardner-Hopkins, Barrister, PO Box 25-160, Wellington 6011.

Documents for service on the Conservation Board may be sent to that address for service or may be emailed to james@jghbarrister.com. Service by email is preferred, with receipt confirmed by return email.