

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

Application No. Misc 1/2005

IN THE MATTER
of Section 409(d) Cook Islands Act 1915

AND

IN THE MATTER
of the land known as Papua 4 Papua 4A
Vaimaanqa 5A Takitumu

BETWEEN

Ranginui Family Trust
Plaintiff

AND

National Environment Service
Defendant

Date of hearing: 6 January 2005
Date of decision: 6 January 2005

Mr Rasmussen for Plaintiff
Mr Elikana for Defendant

REASONS FOR DECISION OF GREIG CJ

- 1.** The Plaintiff applied for an injunction in effect to stop the procedure of the application for a project permit by the Tepaki Group for the development of the Captain Cook Resort and Spa at Takitimu. After hearing Counsel in a telephone conference I refused the application. I now state my reasons for the decision.
- 2.** The Plaintiff's case is that the Defendant has failed to carry out its duties and functions under Parts 1 and 5 of the Environment Act 2003 in respect to the application for the project permit. In particular that it failed to undertake the public consultation in accordance with section 36(5) of the Act in that it did not comply with the time limits for receiving comments from the public.
- 3.** The Defendant (the NES) was established under the Act as a body corporate. Its functions are set out in 17 paragraphs in s.9 with the addition of the usual provision for anything incidental or conducive to its other functions. In exercising its functions it must take into account Government policy as conveyed in writing by the Minister. The principal functions are, in general terms, to protect conserve and manage the environment of the Cook Islands its resources wildlife and the waters around it. Two functions which bear especially on this case are its function of monitoring and evaluating activities which significantly affect the environment and the provision of

administrative and secretarial services (including technical advice) to each Island Environment Authority s. 9(1)(g) and (h).

4. The Island Environmental Authorities (IEA) are established for Rarotonga and each Outer Island to which the Act applies. We are concerned with the Rarotonga IEA. They each have general functions in the promotion of good environmental policy and practice in conjunction with the NES. They have the function of determining applications for permits including a project permit under s.36 as is the case here. Again the IEA must take account of Government policy as conveyed in writing by the Minister.

5. Part 5 of the Act is headed "Environmental Impact Assessment" and sets out in s.36 the procedure for the application and determination of project permits which are required if a person is to undertake any activity which is likely to cause significant environmental impact. It appears that the Captain Cook Spa and Resort is or will be such an activity. Accordingly the promoters made an application to the NES. That application is subject to any regulations under the Act but I am informed that no regulations have been made. The application must include an environmental impact assessment (an EIA). The EIA must set out details of the matters specified in s. 36(30(a), (b) and (c)).

6. The procedure that follows is that the NES must undertake "public consultation for the issuance of the project permit" s. 36(5). The subsection specifies that in so doing, that is in undertaking public consultation, it must publish details of the project so as to be accessible to the public, make available copies of the EIA for review by the public and receive comments within 30 days from the date of public notice from the general public and interested parties. There is no specific provision about the public notice or how and where it is to be made apart from the requirement that the details be accessible. Whether the obligation to consult extends beyond the particulars spelled out in the section I do not decide. That was not canvassed in the hearing before me.

7. In addition to those requirements of general publicity the NES must request comments from "any Government department or agency, or person affected by or having expertise relevant to the proposed project or its environmental impact" s. 36(6). Whether that requirement would include the Plaintiff as a person affected were not canvassed in the hearing or the application. Nor was the scope of the requirement as to persons having relevant expertise which might open a very wide enquiry. I observe that there is no time limit in this sub-section for the receipt of comment.

8. The next sub-section (7) goes straight to the decision making of the IEA. It provides that after the IEA has reviewed and assessed the application and all relevant information including the EIA, subject to guidelines which do not exist yet, it shall issue a permit subject to terms, request modifications or refuse the application stating the reasons for the refusal. In the case of refusal the applicant may appeal to the Minister. There is no provision for any other appeal against the grant of the permit or its terms and conditions.

9. There is nothing in this Part or elsewhere which sets out any duties or function of the NES in receiving the application and the EIA, receiving or considering any comments from the public or the other specially mentioned bodies and persons, assessing or criticizing or sorting the comments, advising the IEA about the EIA or the comments or even how the material is to be delivered to the IEA. Nor is there anything about the possibility of public hearing or private hearing by the IEA of the applicant or the objectors or supporters. The applicant might well believe that it should have an opportunity to comment upon the objections. No doubt the IEA must act in accordance with the rules of fairness in reaching its determination of the matter and

the Court will deal with applications for review in the usual manner. But that is expensive and troublesome to the parties. It may be better to have a code set out in the Act or the regulations to deal with this so that the parties and their advisers may be able to anticipate the proper procedure without later recourse to the Courts.

10. Mr Elikana submitted that the NES had a purely administrative role to carry out on behalf, as it were, of the IEA of the receipt, publication and advancement of the application to the stage where the material was to be submitted to the IEA for determination. This seemed to be in conflict with the actions of the NES, as advised to me, that it had scrutinized and rejected previous applications and impact assessments submitted by this developer. Mr Rasmussen contended for a substantive role for the NES citing para (g) and the reference to technical advice in para.(h) of section 9. Reference was made to the comparative expert position of the NES as the principal body to maintain and promote the environment and the "lay" position of the members of the IEA who have no apparent guidance as to environmental aspects of any EIA or permit project.

11. The Act is silent on the detailed procedure and the function of the NES in relation to Part 5. That is the way the legislation has been drawn and enacted. It is not for the Court to fill the silence with what it might think appropriate and it is not appropriate in a matter of interim injunction proceedings to pronounce on the meaning of an Act in general terms where the legislature has not given any guidance. The Court will interpret and apply an Act to the facts but it does not create legislation or expand it to what some party or parties might think appropriate. Here as I noted the principal party, the developer, has not been joined nor has the IEA for Rarotonga. Their absence did not form part of my decision but it points up the difficulty of dealing with this statute in the absence of submission from the party most affected by the likely delay.

12. The real complaint of the Plaintiff was the lack of adequate notice of the application and the time for comment. The evidence was that the Plaintiff did not become aware of the application until an article in a newspaper on 30 December 2004 which drew attention to the fact that the last day for comment was 3 January 2005. In fact there had been advertisement in newspapers circulating in Rarotonga on 13 and 18 December and some television advertising. It does seem surprising that in connection with a development which has been the subject of publicity and Court proceedings for some years the project permit application required to be dealt with in this preliminary procedure over the Christmas vacation when offices of government and solicitors are closed. I have already noted the possibility that the Plaintiff in any event may be under s. 36(6) entitled to some particular notice.

13. The requirement of s. 36(5)(c) is to receive comments within 30 days of public notice. That does not permit a shortening of the 30 days. The public has all 30 days after public notice, the first one, to make comment. There was an error in this part of the procedure because the advertisement at all times called for comment by 3 January which was not 30 days after the first public notice. Indeed the first advertisement on 13 December state that the period for comment began on 3 December 2004. Mr Elikana on behalf of the NES advised that it had extended the time for comment to 13 January 2005 and that any comment received from the Plaintiff will be received and dealt with as part of the information to be presented to the IEA.

14. This means that the Plaintiff will have some days to consider further and to draft comment to be presented to the IEA. I note that this application raises a number of matters of criticism of the developer's application and the EIA. This shows that the plaintiff has already focused on points that it wishes to raise. The further time now available should allow the Plaintiff to draft with the

aid if its advisers a comment which will deal with the criticisms and opposition it has. These criticisms were canvassed before me as further ground for an injunction but they are matters which do not, in my judgment, amount to errors or misapplication by the NES of its functions and duties. These are matters for consideration and evaluation by the IEA in its determination procedure. It is not for the Court at least at this stage of the proceeding under the Act to evaluate the EIA. That is for the IEA as part of its determination procedure.

15. In the end the Plaintiff now has an opportunity to make its comment and to have it before the IEA. An injunction at this time would delay the application to the IEA until there was a substantive hearing about the proceedings of the NES. At the end of that, the best the plaintiff could hope for would be a new application and a rerun of the procedure in which it would then have an opportunity to make its comment. It has that now and it would not be in the interests of justice to delay that with what in the end would be a vain proceeding with delay and expense. As I said this decision does not mean that the plaintiff does not have at least judicial review rights if it has ground to believe that the determination of the IEA is wrong in law.

16. For the foregoing reasons I refused the application for injunction. Costs are reserved.

Laurie Greig CJ