29.

04/09

DETAILS OF SERVICE OF TRESPASS NOTICE

[Read INSTRUCTIONS below and then complete service details immediately service is effected. If the person served the notice is not the occupier but an agent of the occupier - the full name and address of the person who served the notice is also required.]

THIS NOTICE (photocopy attached) was served:

on T. DE LUCA INVESMENTS LTD & DE LUCA SUPERANNUATION
[Name of Person served] C/- MR CHRIS BALL BDO LEVEL 10, 12 CREEKS BRISBANE. 4000.

on the day of , 20 at a.m./p.m.

at LEVEL 10, 12 CREEK ST, BRISBANE 4000
[Place where service was effected]

by A. BURGOYNE - TE TAUMATA O NGATI KURI RESEARCH UNIT.
[Full Name of Person effecting service]

I served the Trespass Notice personally:

on T. DELUCA INVESTMENTS LTD (AS ABOVE)
[Name of Person served]

by ~~*handing it to them /*dropping it at their feet, when they refused to accept service of the notice.~~
REGISTERED POST.

They *acknowledged / *did not acknowledge that they are the person named in the notice.
They *are / *are not personally known to me.
I believe their *date of birth is _____ / *approximate age is ____ years.

Occupier's full name ALBERT BURGOYNE - TE TAUMATA O NGATI KURI RESEARCH UNIT.

Occupier's Address and phone number P.O. BOX 274 MANGONUI - 0442.

More relevant details:
SUBJECT TO SECTION 27B STATE OWNED ENTERPRISES ACT.
CERTIFICATE C.277984:1 TRANSFER Nº O.N.C.T C277984.2
1183.1858 Hectares section 1, 2, 3, 4, 5, 6 & 7 S.O. PLAN 64251
[For example, "Issued because of alleged disorderly behaviours" or "Issued because of alleged theft". Record here the authorisation if the person who served the notice was a person authorised by the occupier and not the occupier, and attach a copy of the authorisation to this form, if applicable.]

Signed
[Signature of person who served the Trespass Notice]

Full name and address of Person signing Notice ALBERT BURGOYNE - TE TAUMATA O NGATI KURI RESEARCH UNIT.

Date of completion of this form 21-11-19

Instructions

***Photocopy** completed Trespass Notice before serving on the person warned off. Be clear who the occupier is – company, person, partnership etc. Complete this form (DETAILS OF SERVICE OF TRESPASS NOTICE) after service and attach it to the photocopy of the completed TRESPASS NOTICE. Retain for possible court proceedings.*

Introduction

[1] Mr Burgoyne and Te Taumatua O Ngati Kuri Research Unit together appeal from a decision of the Environment Court, pursuant to s 299 of the Resource Management Act 1991 (the Act). The Research Unit appears to lack its own separate legal identity and, if it does, is under the exclusive control of Mr Burgoyne. As such, I intend to refer solely to Mr Burgoyne as the appellant prosecuting the appeal in this judgment.

[2] Mr Burgoyne was not represented by legal counsel at the hearing. Instead, he had the assistance of Mr Wagener who spoke on his behalf in both the Environment Court and on appeal.

Environment Court decision

[3] The Motutangi-Waiharara Water Users Group (the Water Users) comprises a number of individuals who own properties situated in the Aupouri Aquifer in the Far North. They made an application to take water from the Houhora, Motutangi and Waiparera sub-units of the Aupouri Aquifer. One of the Water Users is Te Runanga Ngai Takoto, the registered owner of some of the land that was subject to the application.

[4] The Kaimaumau-Motutangi wetland lies to the southeast and northeast of the proposed groundwater takes. It is said to be the largest wetland in Northland and the third largest peat bog in New Zealand.

[5] The Judge described the matter before the Environment Court as raising:[1]

> important issues about avoiding adverse effects on the natural values and attributes of significant indigenous vegetation, the management of freshwater ecosystems [and] wider issues of significant habitats of fauna under s 6(c) of the Act and Policy 11(a) of the New Zealand Policy Statement in the context of appropriate aquifer management and abstraction.

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1 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28 at [3].

[6] A consent was granted to the Water Users by the Environment Commissioners. The Department of Conservation (DOC) was not satisfied with the conditions, and appealed against those conditions. DOC did not seek revocation of the consent. It sought monitoring, sampling and the identification of trigger levels for actions to prevent possible harm.

[7] Mr Burgoyne also appealed. He sought revocation of the consent. The Judge described Mr Burgoyne's appeal as "somewhat difficult to follow" and raising issues "relating to the Treaty of Waitangi and the Regional Policy Statement."[2] Mr Burgoyne is said to have given evidence largely relating to title issues and historical issues relating to the occupation of the land in question.

[8] The Judge described the approach adopted by the Water Users as "adaptive management."[3] The Judge considered the principal issue in the case was "whether or not the method utilised to avoid adverse effects on the area is an adequate method of adaptive management."[4]

[9] After the hearing, the landowners and Council proposed amendments to the consent conditions. On 19 February 2019, the Court decided that it was generally satisfied with these amendments and directed the parties to prepare a master consent with the amendments suggested or indicated by the courts.[5] Mr Burgoyne did not respond, although the other parties did. The Court confirmed the consent conditions on 16 August 2019.[6] Essentially, there were three main limbs to the Court's substantive decision:[7]

(a) **Avoiding adverse environmental effects.** The Court was satisfied with the adaptive management regime proposed by the landowners, where the development would be incremental, and the environment would be monitored to help prevent adverse effects. The Court said the regime would establish in due course an appropriate method for

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2 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28 at [6].
3 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28 at [12].
4 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28 at [14].
5 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28.
6 *Burgoyne v Northland Regional Council* [2019] NZEnvC 137.
7 *Burgoyne v Northland Regional Council* [2019] NZEnvC 28.

meeting the requirements of the Supreme Court's decision in *Sustain Our Sounds Incorporated v The New Zealand King Salmon Company Ltd*,[8] the New Zealand Coastal Policy Statement, the National Policy Statement on Freshwater Management and the Resource Management Act 1991 "in relation to ensuring the avoidance of adverse effects on significant indigenous vegetation, freshwater ecosystem processes and on significant indigenous habitats and fauna."[9] The Court was also concerned about potential adverse effects within the first 12 months, when the adaptive management regime would have insufficient data to enable its effective operation.[10] It therefore imposed further conditions to monitor the water level in the Reserve area, and of any saline intrusion into the aquifer. The consents could be suspended should exceedances occur, allowing full studies to be undertaken, and any adverse effects on the Reserve Area of aquifer would constitute grounds for revision of the consents.[11]

(b) **"Avoiding cultural effects".** The Court concluded that Mr Burgoyne's concern about cultural effects and kaitiaki responsibility "relate to the avoidance of adverse effects."[12] The Court said:[13]

> Although we do not accept that the anticipated absence of physical effects means there [are] no cultural effects, we are satisfied that the avoidance of adverse effects on the Kaimaumau-Motutangi Wetland coastal area (and the Reserve area) and the avoidance of significant effects on the balance of the area would maintain the mauri of the area, and may improve it in the longer term given the resource information that would be supplied to iwi including Ngai Takoto, Ngati Kuri and others.

(c) **The "land issue".** Mr Burgoyne argued that Ngai Takoto were not the legitimate owners of the lands because they had not produced the certificate of title showing them as owner. He also disputed that his

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8 *Sustain Our Sounds Incorporated v The New Zealand King Salmon Company Ltd* [2014] NZSC 40, [2014] 1 NZLR 673.
9 At [49].
10 At [3], [42].
11 At [50], [54].
12 At [62].
13 At [62].

hapu abandoned its claim to land at issue in this proceeding in respect of Wai 45. The Tribunal noted that Ngai Takoto is the registered owner of some of the land the subject of the application and that any dispute about the proper ownership of land was for another court.[14] However, the Court acknowledged Mr Burgoyne's (and Ngati Kuri's) cultural interest in the land and that "although one iwi may have had mana whenua, this does not mean that other hapu and iwi could not have a legitimate cultural relationship with the land and even utilise it from time to time and occupy it".[15]

[10] The Court noted in conclusion that:[16]

> the advantage of granting such consent would be to not only add to the economic activity of the Far North, but also to provide a basis for future employment in one of the most deprived sectors of New Zealand. It should also provide better information about this important wetland area and potentially lead to better management in the long term.

Appeal regime

[11] Section 299 of the Act provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.
>
> (2) The appeal must be made in accordance with the High Court Rules 2016, except to any extent that those rules are inconsistent with sections 300 to 307.

[12] On an appeal against a question of law arising out of an Environment Court decision, this court must accept the factual findings of the Environment Court.[17]

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14 At [67], [69].
15 At [70].
16 At [80].
17 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 1, [2012] NZRMA 61 at [32]-[33].

[13] To be successful on appeal, the appellant must satisfy the appellate court that: the court at first instance applied the wrong legal test; reached an unreasonable conclusion on the evidence before it; failed to take into account some relevant matter; or took account of some irrelevant matter.[18]

Mr Burgoyne's appeal

[14] I shared the Environment Court Judge's difficulty in following the arguments presented in support of Mr Burgoyne's appeal. However as I understand it he essentially raises two points.

[15] The first concerns land ownership. Mr Burgoyne challenges the title of some of the Water Users to the land which they now own. Mr Burgoyne has an association with the Kaimaumau area and can whakapapa back to the area and to Ngati Kuri. He says that his proven association with the land grants him the right to bring into question the rightful ownership of land in that area. He says that parcels of that land held by the Water Users must be returned to Maori ownership.

[16] In a somewhat related capacity, Mr Burgoyne also states that despite the ownership issue, some of the Water Users are acting in breach of the Overseas Investment Act 2005 by failing to disclose their investments in New Zealand.

[17] His second key point appears to relate to the granting of consent and damage to archaeological sites and the wetland itself.

[18] Mr Burgoyne says there has been a lack of respect for heritage sites within the wetland. He says these sites include Waitapu and early Pākehā settlements. He says that Heritage New Zealand wrote to the Water Users requesting an archaeological survey, and not only was this apparently ignored, but Mr Burgoyne says that these sites have already been desecrated by the Water Users.

[19] He also says that the current studies do not show where the recharge of the aquifer will come from. He says that should recharge from rainwater be inadequate,

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[18] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

then the aquifer is unsustainable. Furthermore, he says that the amount that the Water Users intend to take under their consent are a concern, not only through depletion of that resource, but because of the threat of subsistence. Should subsistence occur, it will have significant effects on not just the wetland, but the local area as well.

Discussion

[20] I shall deal with each of Mr Burgoyne's grounds of appeal in turn.

[21] First, as to Mr Burgoyne's submission surrounding land ownership, I agree with the Environment Court, and with counsel for the respondents on this appeal, that challenging a resource consent application is not an appropriate legal process for challenging ownership of land. In particular, where the appellant is submitting that land disputes and Waitangi Tribunal claims have not been properly determined, and that land has been transferred from Crown entities to private interests in contravention of s 27B of the State Owned Enterprises Act 1986, those matters are much more appropriately dealt with in the Maori Land Court.

[22] Furthermore, as the respondents submit, the Water Users' ownership of the land is not relevant to a determination of whether a consent should be granted or not. As the Court of Appeal in *MacLaurin v Hexton Holdings Ltd* said:[19]

> The structure of the Resource Management Act is such that "any person" may apply for resource consents affecting land over which they might have no ownership or other rights: see s 88 and Gordon and Others *Brookers Resource Management 1991* (looseleaf ed) at [A88.01]. What consent authorities are concerned with is the proposed activity's effects, not the nature of the applicant's legal rights or interest in the particular land.

[23] Nor does Mr Burgoyne's contention that some of the Water Users are overseas entities operating in breach of the Overseas Investments Act 2005 have any bearing on the grant of consents under the Resource Management Act 1991. In any event, Honeytree Farms Ltd, the entity Mr Burgoyne claims is in breach of the overseas investments' regime, has provided correspondence between itself and the Overseas Investment Office that confirms it is complying with that Act, as the overseas person at issue owns less than a 25 per cent stake in that company.

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[19] *MacLaurin v Hexton Holdings Ltd* [2008] NZCA 570 at [47].

[24] Neither of those two points raised by Mr Burgoyne are questions of law that this Court should take into consideration when determining whether the Environment Court's decision was made in error of law.

[25] As regards the suggested lack of respect for archaeological sites and Mr Burgoyne's contention that the Water Users, when requested by Heritage New Zealand to undertake an archaeological survey, chose instead to not respond, the respondents say these claims are without foundation. Mapua Avocados Ltd, one of the Water Users, contacted and engaged with Heritage New Zealand about the archaeological sites, which in turn granted several authorities to Mapua Avocados under s 48 of the Heritage New Zealand Pouhere Taonga Act 2014.

[26] Finally, as to issues surrounding the recharge of the aquifer. Mr Burgoyne has not identified how that matter affects the Environment Court's decision to grant the consents, subject to the various monitoring conditions it imposed. In particular, I note that the Environment Court introduced a conservative water trigger level for the wetland in relation to the first 12 months of monitoring.[20] That trigger level is to ensure that any fluctuation in the water level results in an investigation to determine whether it is a natural occurrence or is related to the extraction of water. The Court also noted that should the water level fluctuate, there is a potential for the consents to be suspended to enable further studies to be conducted. Mr Burgoyne has not shown how the Environment Court was wrong to have issued the consents subject to those conditions in the circumstances.

[27] Nothing advanced or submitted by Mr Burgoyne, or on his behalf, has identified any error of law made by the Environment Court Judge that this Court should correct on appeal.

Result

[28] The appeal is dismissed.

Paul Davison J

[20] At [56]-[58].