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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2682
[2020] NZHC 492

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	AVERIL ROSEMARY NORMAN and WARWICK BRUCE NORMAN Applicants
AND	TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY First Respondent
AND	AUCKLAND COUNCIL Second Respondent

Hearing: On the papers

Appearances: R J Hollyman QC and J W H Little for the applicants
P T Beverley and S M Bisley for the first respondent
P M S McNamara and G D Palmer for the second respondent

Date of judgment: 12 March 2020

JUDGMENT OF PALMER J

This judgment was delivered by me on Thursday 12 March 2020 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
R J Hollyman QC, Auckland
J W H Little, Barrister, Auckland
Duncan King Law, Auckland
Buddle Findlay, Wellington
Simpson Grierson, Auckland

Context

[1] On 6 December 2019, the Normans applied for judicial review of decisions by the Auckland Council and te Tūpuna Maunga o Tāmaki Makaurau Authority. The decisions concern the felling of 345 exotic trees on Ōwairaka Mt Albert in Tāmaki Makaurau, in the context of an ecological restoration project involving the proposed restoration of 13,000 native plantings. The grounds of review involve alleged breaches of the Reserves Act 1977 and failures of consultation. A timetable was set down and a hearing scheduled for 20 March 2020. The close of pleadings date, under r 7.6(4), was 9 December 2019.

[2] On 29 January 2020, the Normans filed an amended statement of claim adding a new cause of action to challenge the decision by the Council not to notify the Authority's resource consent application for the felling. Due to the need to resolve this issue, on 13 February 2020 I set down the substantive hearing for two days commencing on Monday 8 June 2020. The parties filed submissions and are content for me to determine the application to amend the statement of claim on the papers.

Law

[3] Rule 7.77 of the High Court Rules 2016 allows a party to file an amended pleading, including one which adds a fresh cause of action, before the close of pleadings date. Under r 7.7(1), after the close of pleadings date, leave of the Court is required to amend pleadings, other than merely updating amendments. There is no dispute about the relevant legal principles which were summarised by Toogood J in *Oraka Technologies v Geostel Vision Ltd*:[1]

> (a) The paramount consideration is that the parties should have every opportunity to ensure the real controversy goes to trial so as to secure the just determination of the proceeding.
>
> (b) Due regard must also be had to whether the proposed amendment will cause significant delay or prejudice another party.
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> (c) Even where serious prejudice and significant delay will arise, an amended pleading may nevertheless be permitted if the proposed

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1 *Oraka Technologies Ltd v Geostel Vision Ltd* [2015] NZHC 991 at [17] citing *Body Corporate 325261 v McDonough* [2014] NZHC 1821 (citations omitted).

claim has substantial merit and will not cause injustice to the defendants.

(d) The Court should consider the merit, or absence thereof, in a proposed amended pleading.

[4] The timing of the application and magnitude and reasons for the delay are also relevant, as is the effect on public resources reflected in the impact on case management and the timetable to trial.[2] The overarching requirement is for the Court to exercise the discretion in the interests of justice.

Submissions

[5] Mr Hollyman QC, for the Normans, submits leave ought to be granted because:

(a) There is substantial factual overlap between all grounds of review which are inextricably linked. The evidence already filed covers most, and possibly all, of the evidence required.

(b) The original proceedings were filed under extreme urgency. It is proper and expedient that the issues are considered by the same judge in the same proceeding. It will mean no delay and there is no prejudice to the respondents. Requiring separate proceedings to be filed would be undesirable, inefficient and unnecessary.

(c) There is substantial merit to the proposed additional ground of review. The applicants have not just been sitting on their hands but have been actively seeking information regarding the non-notification decision.

(d) Granting leave would ensure the real controversy is heard so as to secure the just determination of the proceeding.

[6] Mr Beverley, for the Authority, opposes leave being granted because:

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2 *Monster Energy Company v Ox Group Global Pty Ltd* [2016] NZHC 2124 at [28]; *Clode v Sullivan* [2016] NZHC 529 at [15].

(a) The applicants were aware of the Authority's decision since 10 November 2019, around a month before proceedings were issued, so there was no real urgency in the initiation of the proceedings. On 8 December 2019, the Authority agreed with the applicants that "it is in the public interest that the matter be heard and resolved quickly". To obtain an early hearing the Authority undertook that the trees would not be felled and it would not require an undertaking in damages. The applicants are breaching the spirit and terms of the agreement between the parties, on which the Authority has relied.

(b) Granting leave to amend the pleading will result in substantial delay in the proceeding. The Authority's investment of time and effort in preparing for an urgent hearing will be lost. The highly important ecological restoration project will be substantially delayed which will cause prejudice to the Authority, Ngā Mana Whenua o Tāmaki Makaurau and the people of Auckland.

(c) The applicants have brought this part of their claim late for no good reason. The applicants' justifications are not tenable.

[7] Auckland Council abides the Court's decision though it makes submissions on timetabling, which I have taken into account.

Should I grant leave to amend the statement of claim?

[8] The just determination of the proceedings requires that the additional cause of action be considered as part of the proceedings, at the same time and by the same judge. It arises from the same factual matrix. On its face, the proposed cause of action has merit. And if leave is declined, further proceedings will inevitably be issued, posing even further delays to the whole process. The two-day hearing on 8 June 2020 represents a delay, of some two months, compared with 20 March 2020. In the scheme of things, I do not consider a two-month delay is significant or seriously prejudices the Authority. But the 20 March 2020 date was vacated in any case, once it was determined not to be necessary for hearing this application.

[9] However, I do warn the applicants that they will need to comply strictly with the timetable. The Authority has acted reasonably and responsibly in agreeing to facilitate the hearing of the proceeding on the basis it would occur in a timely manner. Failures to meet any timetabling steps may attract adverse costs decisions.

[10] I grant the Normans' application for leave to amend the statement of claim as sought. I set timetabling directions as follows:

(a) By **4 pm Friday 3 April 2020**, the respondents will file and serve their statements of defence and any further evidence in support.

(b) By **5 pm Tuesday 21 April 2020**, the applicants will file and serve any reply, and any evidence, strictly in reply.

(c) By **4 pm Friday 22 May 2020**, the applicants will file and serve their synopsis of submissions and common bundle of documents.

(d) By **4 pm Friday 29 May 2020**, the respondents will file and serve their synopses of submissions.

(e) Any party has leave to propose variations to the timetabling directions.

Palmer J