IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2014-419-160
[2014] NZHC 1463

BETWEEN	SAFE WATER ALTERNATIVE NEW ZEALAND INCORPORATED Plaintiff
AND	HAMILTON CITY COUNCIL Defendant

Hearing: 26 June 2014

Counsel: L Hansen for Plaintiff
J A MacGillivray with M S Crocket for Defendant

Oral Judgment: 26 June 2014

ORAL JUDGMENT OF THE HON JUSTICE KÓS

Introduction

[1] The plaintiff, Safe Water Alternative New Zealand Incorporated,[1] claims that a March 2014 decision by the Hamilton City Council to recommence fluoridation of the city water supply is unlawful. It says that the Council was obliged to carry out a special consultation procedure before making decision to resume fluoridation, and failed to do that. Secondly, that the Council failed to have regard to the reasons why it decided to stop flurodating water in June 2013.

[2] Safe Water now applies for interim relief under s 8 of the Judicature Amendment Act 1972. In short, it wants me to stop the Council adding fluoride to the City's water supply until its claim can be argued in full. That is to occur now on Tuesday 9 September 2014. The Council opposes Safe Water's application for interim relief. I should start this judgment by paying tribute to the high quality of the submissions I received from both Ms Hansen and Mr MacGillivray.

1 Herein "Safe Water".

[3] The question is should I grant interim relief?

Background

[4] Hamilton fluoridated its water supply from 1966 until 2013. In December 2012 the Council resolved to undertake a special consultative procedure under Part 6 of the Local Government Act 2002.[2] The purpose of that procedure was to consider whether or not to continue to flurodate the water supply. A statement of proposal was notified for submissions on 1 March 2013. It contained two options. The first was the fluoridation status quo. The second was to stop flurodation.

[5] The Council received 1,385 submissions to stop flurodation, and 170 for the status quo option.

[6] A four day hearing was conducted by the Council in late May and early June 2013. On 5 June 2013 a resolution was passed by the Council, seven councillors voting in favour and one against, to cease flurodating the water.[3] Fluoridation of the Hamilton City water supply ceased accordingly on 20 June 2013.

[7] There was considerable adverse public reaction to that decision. Very quickly, in July 2013, the Council resolved to hold a referendum. That referendum was to be conducted during the October 2013 local body elections. The referendum essentially asked for a 'yes' or 'no' answer as to whether Hamilton's water supply should be fluoridated. In the outcome, a two to one majority of voters said 'yes' to flurodation.[4]

[8] On 28 November 2013, the Council resolved to defer the decision to refluoridate the water supply until judgment had been issued in proceedings on the lawfulness of fluoridation of water in South Taranaki. That case focused on the alleged unlawfulness of fluoridation, based on the New Zealand Bill of Rights Act 1990. On 7 March 2014, the High Court found in favour of the South Taranaki

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2 Herein "the Act".
3 The "June 2013 decision".
4 The vote was 24,635 in favour and 11,768 against.

District Council, holding that it was not unlawful for it to fluoridate its water supply.[5] That decision is now on its way to the Court of Appeal.

[9] On 27 March 2014 the Council resolved, this time by a vote of 9 to 1, to recommence fluoridation of the City's water supply.[6] That decision has not yet been implemented. At least, to the extent that the Council has not yet reinserted fluoride into the Hamilton City water supply. It has however taken the capital steps required to implement that decision at short notice.

The substantive claim in a nutshell

[10] Safe Water applies for judicial review of the Council's decision-making procedure in two respects.

[11] First, it says that the Council failed to employ the special consultative procedure prior to making the March 2014 decision. It says that the Council had to do this. Either because the reintroduction of fluoride required an amendment to the City's Long Term Plan, or because it was a "decision of significance" under the Council's Significance Policy.

[12] Secondly it says that the Council failed to take into account relevant considerations before making the March 2014 decision. In particular, the reasons it decided to cease fluoridation in June 2013.

[13] The Council says it did not need to comply with the consultative procedure. And it says that an officers' report to contrary effect in May 2013 was written in error. It used the special consultative procedure to reach the June 2013 decision. But it was entitled not to use it for the March 2014 decision following, as it did, an electoral referendum.

[14] Just because, says the Council, a decision is significant does not mean the special consultative procedure must be followed. The Significance Policy does not say it must. Section 83 of the Act requires the procedure to be used where required

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5 *New Health NZ Inc v South Taranaki District Council* [2014] NZHC 395.
6 The "March 2014 decision".

by statute. But Mr MacGillivray says there was no relevant statutory requirement here. He disagrees with Ms Hansen's analysis of s 97 of the Act. He accepts that the Hamilton City water supply is a "significant activity". But he does not accept that the decision to insert fluoride or to remove fluoride from the water supply is a significant change to the level of provision of service of that significant activity.

[15] Those issues are going to have to be decided by the trial Judge, and not by me.

Interim relief

[16] Safe Water now applies for interim relief under s 8 of the Judicature Amendment Act 1972. It seeks an order preventing the Council from recommencing the addition of fluoride to the Hamilton water supply until its substantive claim for judicial review is decided.

[17] Section 8 provides, relevantly:

> (1) Subject to subsection (2) of this section, at any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:
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> (a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:
>
> ...

Applicable legal principles

[18] The Courts generally follow the two-stage inquiry first set out in *Carlton & United Breweries Ltd v Minister of Customs*.[7] That approach was subsequently approved by the Supreme Court in *Easton v Wellington City Council*.[8] The Court inquires first whether it is necessary to grant interim relief to preserve the position of the applicant. Secondly whether, having regard to a range of relevant considerations,

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7 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 429 (CA) at 430.
8 *Easton v Wellington City Council* [2010] NZSC 10.

it is appropriate to grant the relief sought.[9] The Court has a wide residual discretion under s 8.

[19] This two-stage approach is sometimes in practice reconfigured into three stages, with a new first stage. That additional stage is to ask, as one does in the case of interim injunctions, whether there is a serious question for trial. In judicial review interim relief terms the test is whether there is a real contest between the parties.[10] That three-stage approach was taken by the parties here. I see nothing wrong in principle with considering, as a first stage, whether there is a real contest between the parties. But the relevant strength of an applicant's case should only be considered as part of the final discretionary stage.

Stage 1 – real contest

[20] On this point the Council submits:

> Given the factual nature of the process challenges, [the] Council does not say that there is no possible issue to be tried at all ... [the] Council says that the plaintiff does not have a strong prima facie case and this should also tell against interim relief.

[21] The Court does not need to be satisfied whether Safe Water has a strong prima facie case. It merely needs to decide whether there is a real contest between the parties. In effect the Council concedes that there is. And I agree.

Stage 2 – necessity to preserve applicant's position

[22] Necessity to preserve the applicant's position is the statutory threshold that must be found to exist before the Court considers the final stage discretionary factors. In *Carlton,* Cooke P said that "necessary" means "reasonably necessary" in all the circumstances of the particular application.[11] Necessity to protect a position requires that there is indeed a position to be protected. One which may well be eroded by an absence of interim relief.

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9 *Air National Corporate Ltd v Director of Civil Aviation* HC Wellington CIV-2011-485-135, 2 February 2011 at [10].

10 *Esekielu v Attorney-General* (1993) 6 PRNZ 309 (HC) at 313.

11 *Carlton & United Breweries Ltd v Minister of Customs,* above n 7, at 430.

Submissions

[23] Ms Hansen says that the Council has not yet restarted the refluoridation of water, and it is appropriate that it preserve the status quo by not doing do until the lawfulness of its processes are tested in September.

[24] Secondly, she says that if the Council employs equipment it already has in place to fluoridate the water then, in "psychological" terms, it would have obtained an advantage. That is because Councillors will then be more likely to decide to fluoridate (after undertaking any further consultation that the Court orders).

[25] On the other hand Mr MacGillivray, for the Council, says that necessity, as opposed to desire, must be made out. The best outcome that Safe Water can get from the substantive proceeding is an order that the Council must re-consult and re-decide. That outcome, he says, cannot be eroded by an absence of interim relief.

Analysis

[26] Safe Water challenges the Council's decision-making procedure. It wants the Council to make a decision on the issue of fluoridation based on a proper process. Safe Water's ultimate goal is that fluoridation of Hamilton's water supply cease. But it does not challenge the legality of fluoridation in this proceeding. Contrast the plaintiffs in the South Taranaki case. It is not in Safe Water's case suggested that the Council could not rationally make the same decision again, following application of the correct process.

[27] Nor is it suggested, on any cogent medical evidence, that the short resumption of fluoridation before substantive trial will materially harm the health of any member of Safe Water or the public generally. In fact the evidence of health effects in this case, in the short term before trial in September, is entirely neutral. There is neither evidence of material disadvantage, nor evidence of material advantage, to health.

[28] Safe Water's position, the protection of which I am now considering, is simply a right to due process. I do not find that right to be likely to be eroded by

permitting the challenged decision to be implemented. The literal invisibility and indetectability of fluoride means that Safe Water's rights to due process cannot materially be impaired by recommencement of fluoridation in accordance with the March 2014 decision. This is not a case where the Council will steal a tangible march by implementing a decision now challenged in these proceedings.

[29] I do not agree with Ms Hansen's submission that the Council would obtain a "psychological advantage" inasmuch as Councillors will be pre-disposed, by reason of expenditure between now and September, to re-decide in favour of fluoridation. The psychological advantage instance was given by Nicholson J in *Smith v Taupo District Council.*[12] That was a case concerning a developer undertaking earthworks, the legitimacy of which was significantly in doubt. What Nicholson J identified there as a psychological advantage was that if the developer were permitted to complete those earthworks, but was then required to go through a public notification process, it would obtain a psychological advantage in that process by reason of the completion of those works in the interim.

[30] This is not such a case. In fact, on examination on the evidence it appears that the only further costs the Council will incur between now and September are costs of the order of $2,405. Of which $1,600 is the cost of the chemicals to be inserted in the reservoir. If anything, the fact that the costs faced by the Council are an operating rather than capital nature might suggest a pre-disposition against expenditure.

[31] Nor is it appropriate to direct the Council to stop an activity which it is not alleged the Council could not lawfully conduct following due process. Interim relief generally is inappropriate where it results in greater relief being given in the interim order than is available under the substantive claim.[13] If Safe Water succeeds in its substantive claim, its best case outcome will be a declaration that the March 2014 decision was invalid and must be made again following a proper decision-making process. The outcome in this case could never be orders that the Council not re-fluoridate the water supply. What Safe Water wants from this application for interim

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12 *Smith v Taupo District Council* HC Rotorua CP36/01, 23 November 2001 at [21].
13 *Commissioner of Inland Revenue v Lemmington Holdings Ltd* [1982] 1 NZLR 517 (CA) at 524.

relief is therefore more than it could get from a successful application for judicial review.

Conclusion

[32] Safe Water has not met the threshold that it is reasonably necessary to order the Council not to recommence the fluoridation process to protect Safe Water's position.

Stage 3 – discretionary considerations

[33] Although the threshold for interim relief has not been met in this application, I will briefly consider the final stage. The final stage discretionary considerations were described in *ENZA Ltd v Apple and Pear Export Permits Committee*[14] in these terms:

> Amongst the circumstances of a case that the Court often considers in respect of s 8 are the strengths and weaknesses of the plaintiff's case, the competing advantages and detriments to the parties, the status quo, the balance of convenience, public repercussions as well as private, and the overall justice position.

I will briefly address the points raised by parties in their submissions under this stage.

Strength of Safe Water's case

[34] It is common ground there is a real contest between the parties. At the crux of the substantive proceeding is the Council's decision not to follow the special consultative procedure in relation to the March 2014 decision to re-fluoridate the Hamilton water supply, when it had followed that procedure in relation to its decision to stop fluoridation in June 2013. The Council's position now is that it never needed to use the special procedure for either decision. And that its officers were wrong in suggesting otherwise in May 2013. The Council's position may yet be found to be correct. It does not seem to me that Safe Water has a particularly strong case that the Significance Policy requires the use of the special consultative

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[14] *ENZA Ltd v Apple and Pear Export Permits Committee* HC Wellington CP266/00, 18 December 2000.

procedure in all cases. Section 83 only requires the use of the special consultative procedure where statute requires it. The real question in this case becomes whether s 97 requires the use of that procedure for the activity of fluoridation in the water. I have described that debate already when describing counsel's submissions.[15] I do not need to say more on than this.

[35] It can be said that Safe Water has a reasonable chance of success at trial.[16] But its case is not necessarily a strong one.

Prejudice

[36] If there is no material prejudice to the defendant, it tells in favour of granting interim relief.[17] The Council has already incurred most of the costs it considers necessary to re-commence fluoridation, including all necessary capital costs. The remaining costs, $2,405, are largely operational in nature. But on the other hand I have also found that Safe Water's position will not be prejudiced by denial of interim relief.

[37] The net result therefore is that any prejudice consideration is neutral.

Risk to public safety

[38] Where public safety is a major concern, the Court should take a common sense approach; the test for interim relief should not be set unduly high.[18]

[39] Safe Water contends that there are real safety issues in relation to the use of hydrofluorosilicic acid, the chemical used to fluoridate water. It is, it says, a highly toxic by-product of the superphosphate industry. It describes its use in the Hamilton water supply as using that supply as a "dumping ground" for pollutants.

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15 See [10]–[14] above.

16 *Esekielu v Attorney-General* (1993) 6 PRNZ 309 (HC) at 313.

17 *Bevan v Institute of Chartered Accountants of New Zealand* HC Wellington CP270/00, 15 December 2004 at [14].

18 *Coromandel Peninsula Watchdog Inc v Hauraki District Council* [1997] 1 NZLR 557 (HC) at 558.

[40] On the other hand, Hamilton's water supply was continuously fluoridated from 1966-2013. And there is no evidence before that would suggest that the short term resumption of this practice would be harmful to public safety. I take judicial notice of the fact that fluoridation is common in other New Zealand districts. And that it is apparently supported by the Ministry of Health. Safe Water's deponent, Mr Crosbie, does not hold any relevant medical qualifications.

[41] Considerations of public health safety are also neutral.

Conclusion

[42] Even if interim relief had been necessary to preserve Safe Water's position, the last stage discretionary factors, viewed overall, are neutral to the application. It follows that no compelling case for interim relief has been made out.

Result and directions

[43] Safe Water's application for interim relief is dismissed.

[44] This case can and should now proceed to a substantive determination, on Tuesday 9 September 2014.

[45] By consent I make the following directions:

(a) Discovery by the Council is to be completed by **7 July 2014**.

(b) Safe Water is to file an amended statement of claim by **14 July 2014**.

(c) The Council is to file an amended statement of defence by **21 July 2014**.

(d) Any reply from Safe Water is to be filed by **29 July 2014**.

(e) Any further affidavits on behalf of Safe Water are to be filed and served by **29 July 2014**.

(f) Likewise, any further affidavits from the Council are to be filed and served by **12 August 2014**.

(g) Safe Water's submissions are to be filed and served by **26 August 2014.**

(h) Likewise, the Council's submissions are to be filed and served by **2 September 2014**.

(i) Trial will commence (one day allowed) in this Court on **Tuesday 9 September 2014**.

(j) Leave is reserved to either party to apply for variation to these directions on three days' notice.

Stephen Kós J

Solicitors:
Harrington Law Limited, Auckland for Plaintiff
Tompkins Wake, Hamilton for Defendant