Ngai Tahu Properties Ltd v Central Plains Water

Richard Budd*

Introduction

There has been a lot of interest and debate over the issue of who has priority since certain resources have either approached or been deemed to be already at sustainable limits. Nowhere is this more evident than in the arena of water allocation. The "first in line, first in time" principle established in *Fleetwing Farms Ltd v Marlborough District Council* CA 255/96 Richardson P, Keith J, Cartwright J. has been criticised by many parties as an inefficient mechanism. Addressing this issue was one of the priorities stated in the "Water Programme of Action" initiated by the Labour Government in 2003. A new, more efficient method would be found, with suggestions that "merit" would be a key consideration. The report in 2008 from the Water Programme of Action committee was strangely silent on the matter, strongly suggesting, with apologies to Winston Churchill, that while "first in line, first in time" may not be perfect, it is the best system we have.

The competition being played out for priority access to the higher reliability, "A" permit, water from the Waimakariri River has introduced a new element to the consideration of priority access to resources. That is the issue of when priority is determined.

This article follows the process for determining priority through the Courts up to the Supreme Court where the matter has been heard but a decision is not expected until early in 2009. The key sections of the RMA 1991 are; Part II s.5, s.21, s.37, s.91, s.92, and s.95.

The Applications

In 2001 Central Plains Water Steering Committee (a Joint Committee of Selwyn District Council (SDC)/Christchurch City Council (CCC) lodged applications with Environment Canterbury (ECan) for consent to take water from the Waimakariri and Rakaia Rivers. The purpose was to pave the way for further planning and subsequent applications to "use" the water to irrigate the scheme south of the Waimakariri River. In Dec 2001 ECan informed Central Plains Water (CPW) the consent was "notifiable" but the process would not proceed until subsequent consents were lodged. No "use" applications were filed until Nov 2005.

In January and June/July 2005 Ngai Tahu Properties Ltd (NTPL) applied for consent to "take and use" water from the Waimakariri to irrigate land to the North of the river.

The Environment Court

NTPL applied to the Environment Court (EnvC) for a declaration that its application was entitled to priority over the CPW application. The Court granted a declaration in those terms.

The High Court

Central Plains Water Trust v Ngai Tahu Properties Ltd Randerson J, CIV-2006-409/2116

The Environment Court Decision was upheld by the High Court (HC). The HC considered the fact that CPW's application was notifiable but was put on hold under section 91 by ECan, pending the "use" application, deprived it of priority, should the latter application be notified first.
The HC determined that priority for competing applications is generally decided on which one is first ready for notification, but circumstances can displace this:

- A request for further information under s.92; and/or
- A decision under s.91 to not proceed with notification pending further applications; or
- Unreasonable delay by an applicant.

Randerson J granted leave to appeal his decision to the Court of Appeal (CA), being satisfied that the case raised serious issues of general and public importance relevant not only to these two parties but to other applications for resource consents and to Territorial Local Authorities (TLAs) and Regional Councils (RCs) dealing with competing applications for finite resources.

The Court of Appeal

Central Plains Water Trust v Ngai Tahu Properties Ltd [2008] NZCA 71. Hammond Robertson and Baragwanath J,

Each party accepted the result in Fleetwing (to which the CA is bound) to the extent that they accept the priority principle. Fleetwing addressed the legal test for determining priorities for hearing competing appeals in the Environment Court. The Court "stands in the shoes of the Council" so priority must be determined the same way. Rather than competing appeals this case turns on competing applications to the Council. But CPW and NTPL advanced competing submissions as to the application of the Fleetwing decision. See *Fleetwing Farms Ltd v Marlborough District Council* CA 255/96 Richardson P, Keith J, Cartwright J.

Lords Simon and Diplock in *Maunsell v Olins* [1975] AC 373 at 391 observed that statutory language, like all language, is capable of an almost infinite graduation of "register". They noted that it is the duty of the court to tune in to such register and to interpret the statutory language so as to give it the primary meaning which is appropriate to the register unless it is clear that some other meaning must be given to achieve the statutory purpose or to avoid injustice, anomaly, absurdity or contradiction.

The text of the RMA provides no clear answer. Leave to appeal was granted under s.144(2) of the Summary Proceedings Act 1957, imported by s.308 RMA. The questions posed by the HC are:

1. Whether the determination of priority between competing applications for resource consents should be determined by which one is ready first for notification;
2. If the answer to (1) is yes whether a decision under s.91 of the RMA not to proceed with notification means that the application is not ready for notification until the additional consents are made.

The *Fleetwing* judgement placed significance on the legislative timetable

- S.21 duty to avoid unreasonable delay
- S.95 notification in 10 working days
- S.92 10 days further info sought
- S.37 time extensions

The CA, having emphasized the time limits concluded:

- Each application is to be determined on its own merits. RMA does not allow for comparative assessment of competing claims.
- RMA does not provide for the refusal of an application on the ground that another one might meet a higher standard than the Act specifies.

So *Fleetwing* decided that priority is determined on a first come first served basis; and each application must be considered individually on its merits without regard to other applications. *Fleetwing* did not determine at what stage priority is achieved. Unless the case is distinguishable, only this last point was open for the CA to decide.

ECan, 21/12/01 in writing, to CPW advised that the "Take" application was notifiable without the need for further information. However the letter went on to say notification would be deferred under s.91 as further applications would be required. ECan, in August 2004, wrote to CPW drawing attention to the substantial delay in obtaining the further information sought and referring to s.21, the duty to avoid unreasonable delay. CPW responded (15/10/04) advising that the application was to be pursued. ECan (18/03/05) wrote to CPW requiring further info by 31/03/05 or it would withdraw the application. The timeframe was subsequently extended, amendments were made to the application and the further applications were received on 24/11/05. ECan notified all consents, satisfied that sufficient information was at hand, on 24/06/06. This was 9 months after notification and 4 months after the hearing of Ngai Tahu's application.
Given that priority is to be determined on a 'first in line, first in time' basis, the question for the CA was how and at what stage priority is achieved. The CA determined that the Courts below (EnvC and HC) took too narrow a view. While this issue is to be determined by both the text and the purpose of the Act (s.5) here the purposive approach is critical because there is no solid textual answer (See Acts Interpretation Act 1999). In *Northland Milk Vendors Association v Northern Milk Ltd* [1998]1 NZLR 530 (CA) Cooke P stated "The Courts can in a sense fill gaps in an Act but only to make the Act work as Parliament must have intended" (at 537).

The CA determined that three points were relevant here:

1. The primary function of promoting sustainable management of natural and physical resources and reconciling the competing values of the RMA (e.g. development and protection of the

natural character of rivers: ss.5(2) and (6a))
2. The "inclusive and democratic procedure" of the RMA
3. The timetable provisions of the RMA

The CA found in considering these points:

1. The court supports a priority decision in favour of CPW. Larger major developments should not be trumped by later smaller simpler applications that are able to be made comprehensively without the need to proceed in stages.
2. The CA determined that the "inclusive and democratic procedure" of the RMA would be accommodated by conferring priority to CPW. It could be different if NTPL had no knowledge of CPW but the Ngai Tahu collective has two members on the CPW Trust.
3. While s.21 requires the avoidance of unreasonable delay and s.95 requires notification within 10 working days (and

   for s.92) and s.37 allows for extensions to double these timeframes, s.91 provides an explicit dispensation from those time limits.

While the timetable regime presumptively favours Ngai Tahu, it provides specific provision for exceptional cases. Ngai Tahu argued that because CPW's final take application and the subsequent use applications was lodged after their application CPW should lose priority. The CA was not of that opinion, determining that "This is not an insubstantial or colourable application which should in terms of *Burr v Blenheim Borough Council* be brushed aside in favour of a later more comprehensive application.

The Court (*Central Plains Water Trust v Ngai Tahu Properties Ltd*[2008] NZCA 71) therefore found that an application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognizing the need for subsequent applications could not be filed, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application. It awarded $10,000 costs plus disbursements against NTPL.

The Supreme Court has granted leave to Ngai Tahu Property Ltd to appeal against this decision *Ngai Tahu Property Ltd v Central Plains Water Trust* 24/06/08, SC15/2008, the case has been heard and the outcome is awaited.

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