IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP249/02

UNDER	Part I of the Judicature Amendment Act, 1972
AND UNDER	Part VII of the High Court Rules
BETWEEN	GENESIS POWER LIMITED **Applicant**
AND	THE ENVIRONMENT COURT OF NEW ZEALAND **First Respondent**
AND	WHANGANUI RIVER MAORI TRUST BOARD, HINENGAKAU DEVELOPMENT TRUST, NGATI HIKAIRO HAPU FORUM, NGATI TAMA O NGATI HAUA TRUST, PUNGAREHU MARAE INC SOC ON BEHALF OF NGATI TUERA HAPU and NGATI RANG1 TRUST **Second Respondents**
AND	NGATI RANG1 TRUST **Third Respondent**
AND	TAMAHAKI INCORPORATED SOCIETY **Fourth Respondent**
AND	TUI BRABYN and ROD BROWN **Fifth Respondents**

AND WAIKATO REGIONAL COUNCIL and MANAWATU-WANGANUI REGIONAL COUNCIL

Sixth Respondents

Hearing: 16 December 2002

Counsel: G P Curry and P F Majurey for Applicant
JAL Oliver for First Respondent
J P Ferguson for Second Respondents
No appearance for Third Respondent
R P Boast and B E Ross for Fourth Respondent
No appearance for Fifth Respondents
No appearance for Sixth Respondents

Judgment: 17 December 2002

RESERVED JUDGMENT OF RONALD YOUNG J

Solicitors:
Russell McVeagh, Auckland, for Applicant
Crown Law Office, Wellington, for First Respondent
Walters Williams & Co, Wellington, for Second Respondents
No appearance for Third Respondent
KPMG Legal, Wellington, for Fourth Respondent
No appearance for Fifth Respondents
No appearance for Sixth Respondents

[1] In these proceedings the Applicant seeks judicial review of the Environment Court's decision to adjourn an appeal before it affecting resource consent applications for the Tongoriro Power Development ("TPD"). The Applicant says the Environment Court's decision to grant the adjournment application was a decision based on a statutory power and came within s3 Judicature Amendment Act 1972 and therefore was vulnerable to review. And it says the decision was unauthorised, invalid, and that the Court had regard to irrelevant considerations and acted unreasonably. The First Respondent appeared to abide the decision of the Court. The Sixth Respondent filed memoranda in support of the application but made no appearance.

Background Facts

[2] In June 2000 Genesis Power Ltd ("Genesis") lodged 58 resource consent applications relating to the water aspects of TPD. These applications were lodged with the Waikato Regional Council and the Manawatu/Wanganui Regional Council. The applications were considered and granted by a joint committee of the two local authorities. A comprehensive list of conditions was imposed.

[3] A number of appeals were lodged in September/October 2001 against the local authority's decision. Some of these appeals have been resolved between the parties but other appeals remain live. All parties have participated in an extensive case management regime to bring this complex case to hearing. In January 2002 the current case was set down for hearing to commence on 20 January 2003 for between 15 and 20 weeks. Hearing time was to be spread over a six month period. Evidence timetable orders were made.

[4] In February 2002 the Whanganui River appellant's representatives (essentially the Second to Fifth Respondents in these proceedings) agreed to file a notice identifying the issues to be contested at the appeal by 12 April 2002. By August 2002 at the fifth case management hearing, the Whanganui River appellants remained in default of the February 2002 order. Further interlocutory orders and conferences were held.

[5] By 24 October 2002 the Whanganui appellants finally filed and served their statements of particulars eight months after due date. The appellants had still not filed their briefs of evidence by November 2002 many months after due date (and have still not done so to date).

[6] In November 2002 the Whanganui River Maori Trust Board and other associated bodies applied for an adjournment of these proceedings. The application was heard on 20 November and in a reserved decision delivered on 27 November the Judge granted the application. By the time the application for adjournment was considered the majority of the appellants had resolved their cases and thus had significantly narrowed the issues for the Court. The bulk of the hearing therefore was to be concerned with the issues raised by the River Trust and other Whanganui River Maori appellants.

The application for the adjournment

[7] The basis of the application for the adjournment before the Environment Court is set out in paragraph 16 of the submissions in support of the application for adjournment as follows:

> "These circumstances form the basis for adjournment that is now sought in relation to the current appeals, on the grounds that the Whanganui River settlement negotiations are shortly to begin in earnest (indeed, have already begun) and that issues before this Court are likely to be affected by the outcome of those negotiations. In this situation, it is submitted that it would be the most effective use of the parties' and the Court's time and resources for the hearings [to] be adjourned at least until July 2003, by which time all parties will be in a better, more fully informed position from which to determine on what basis the appeals should in fact proceed."

[8] In support of this application the Respondents attached a copy of a letter addressed to them from the Hon. Margaret Wilson, Minister in Charge of Treaty of Waitangi negotiations. That letter states in full:

> "Office of the
> Minister in Charge of Treaty of Waitangi
> Negotiations

Te Tari o Te
Minita Mona te Mana Whakarite Take e pa ana ki
Te Tiriti o Waitangi

12 November 2002

Archie Te Atawhai Taiaroa
Whanganui River Maori Trust Board
PO Box 323
WHANGANUI

Tena koi

Whanganui River Negotiations

The Crown is committed to reaching a good faith settlement of the Whanganui River Claim and has agreed to proceed to formal negotiations with Whanganui immediately, which will be appropriately resourced. Issues associated with the use of the water will form part of those negotiations and the Crown undertakes to meet commitments reached through those negotiations.

To the extent that the settlement includes Crown undertakings of commitments that impact on all or any aspects of the Genesis consents, the Crown will give effect to those commitments by taking whatever steps are appropriate and necessary, including the introduction of legislation relating to the rights and current and future use of the river.

The agreements reached will be incorporated in a Deed of Settlement, which once ratified will be signed by the parties. The Deed of Settlement will form the basis of settlement legislation, which when enacted will become an Act of Parliament, binding upon the Crown and others.

At the conclusion of the Deed of Settlement the Crown will use its best endeavours to immediately introduce settlement legislation.

Yours sincerely

Hon Margaret Wilson
Minister in Charge of Treaty of Waitangi Negotiations"

[9] In support of the application for adjournment the appellants maintained that the Whanganui River settlement negotiations had now begun in earnest between the Government and Whanganui Maori. They said:

> "On the current timetable, the settlement negotiations for the Whanganui River claim will not have concluded by the beginning of

> the Environment Court hearings. However, [those] negotiations have now commenced in earnest and [the] issue of the Genesis resource consents is to be included in those negotiations.
>
> Since those meetings with Ministers of the Crown, there have been various reports of statements by Crown officials, including Ministers, to the effect that if the Environment Court were minded to uphold the granting of the TPD resource consents, then depending on the progress of settlement negotiations, Parliament could introduce amending legislation to prevent those consents from being exercised as anticipated by the Court."

[10] Thus it was said by the Respondents that to proceed with the Environment Court hearing before negotiations were complete would be a waste of the parties' and the court resources. They submitted there would be no prejudice to any party and indeed would be of benefit to all by a refinement of the issues.

[11] The Respondent opposed the application for adjournment. It reminded the Court of its obligations under the Resource Management Act to hear and determine proceedings as soon as practicable, and the Environment Court practice note which encouraged the early hearing of appeals and made it clear that adjournment of hearings would be rare. The Respondent stressed that the letter from the Minister was vague and nothing could be read from the contents. And they said it was inappropriate for the Environment Court to take into account the fact that the Government may introduce legislation to the House which could affect the decision of the Environment Court.

[12] The Judge in his decision considered:

(1) That the overall interests of justice was the determinant.

(2) "In the present case the only clear and logical inference from the Minister's letter is that the Crown's undertaking may well impact on "all or any aspects of the Genesis consent" and be given effect to by the introduction of legislation.

(3) If the hearing proceeded there would be parallel processes of negotiation between iwi and the Government and adjudication in the Environment Court.

(4) To spend 16 weeks on proceedings that may be "impacted upon by the subsequent settlement between the Crown and Whanganui iwi would not only be an efficient use of the Court's processes but would impact upon the parties to appeals that are awaiting hearing" or seen as unattractive. And "I stress that this adjournment is made as a consequence of the unusual circumstances of this particular case. The adjournment is for a limited time to enable the Crown of Whanganui Maori to reach some measure of agreement".

[13] He therefore granted the adjournment until 31 July 2003. The parties were to reconvene by way of judicial conference on Monday 7 April by which time the Trust Board appellants were to have lodged with the Court memorandum advising the up to date position of the negotiations and a suggested timetable for the final determination of the proceedings.

Jurisdiction

Is an adjournment a statutory power of decision-making within s3 Judicature Amendment Act 1972 and therefore susceptible to review?

[14] The answer is clearly yes if the decision on the adjournment application comes within the definition of statutory power of decision noting especially (a) or (b) set out below.

[15] "Statutory power of decision" means; s3 Judicature Amendment Act 1972

> **"Statutory power of decision** means a power or right conferred by or under any Act, or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting-
>
> (a) The rights, powers, privileges, immunities, duties, or liabilities of any person; or

(b) The eligibility of any person to receive, or to continue to receive, a benefit or licence, whether he is legally entitled to it or not."

[16] I turn to the question of whether there has been the exercise of a power conferred by statute when the Court considered and granted the adjournment. Section 269 of the Resource Management Act as relevant states:

"269 Court procedure

(1) Except as expressly provided in this Act, the [Environment Court] may regulate its own proceedings in such manner as it thinks fit.

(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency.

(3) The Environment Court shall recognise tikanga Maori where appropriate."

[17] This section empowers the Court to consider, grant, or refuse applications for adjournments. Such are essential aspects of the regulation of proceedings. And s21 and s272 of the Resource Management Act have implicit within them powers of adjournment. I am satisfied therefore that the decision made by the Environment Court on an application for an adjournment is the exercise of a power conferred by statute.

Does the decision to adjourn effect rights, powers or privileges or the eligibility to receive a benefit?

[18] *In Kersten v Stack* 6 PRNZ 300 (CA) at 306 the Court said:

"We do not read this part of the judgment as suggesting that decisions on procedural or interlocutory steps in the course of a hearing can never affect rights or liabilities so as to become subject to judicial review. If that was the intention, then we respectfully disagree. One must look at the particular situation in each case.

. . .

Clearly some orders made in the exercise of statutory power will be simply procedural or administrative and will not affect rights or privileges so as to amount to the exercise of a "statutory power of

> decision" within the Judicature Amendment Act 1972. In other cases even an interlocutory order, such as the granting of an adjournment, may have that effect. In the present case, the effect of the adjournment is not that the appellant will be convicted instead of having the case against him dismissed, but merely that the decision whether to convict or dismiss will be made at an adjourned hearing on the basis of the evidence then available. He had no right or even legitimate expectation to have this question decided in the absence of the informant's witnesses."

[19] The question therefore is whether the decision to grant the adjournment affects the rights or privileges of the parties or the eligibility to receive or continue to receive a benefit.

[20] The Court recorded Genesis' claim that the granting of an adjournment would affect it in the following ways:

(1) The need to re-prepare complex and logistically difficult case.

(2) Witnesses' inconvenience.

(3) The effect on contractors commissioned to carry out work to implement the consents.

(4) Additional water leases agreed to by Genesis unable to proceed.

(5) The flow-on effect on similar claims in the Waikato region. Thus other applications to use natural and physical resources could be effectively stayed until tribal and Government negotiations were complete.

(6) The outcome of the appeals has a flow-on effect on resource consents for the Waikato hydro stations and the Wairaki Geothermal Power Stations.

(7) Witness availability. The Plaintiff placed considerable stress in the original hearing on witness availability including:

(a) Academic witnesses who had rearranged their teaching obligations around the hearing.

(b) Overseas witnesses whose availability this year beyond the first part of the year was doubtful.

(c) Other witnesses had put off commitments until mid-year. These witnesses were unlikely to be fully available until late in 2003 or 2004.

(d) A particular witness had arranged to relocate her family to Auckland during the hearing.

[21] In addition, Genesis says that it has a legitimate expectation that its case will be heard on the date allocated. It has participated in a case management regime of at least 12 months. Throughout this time iwi wished to negotiate with the Government and it was known this was a future possibility. Genesis had at considerable expense set up the infrastructure for a 20-week hearing over six months. It now faces the prospect it submits of an adjournment for an unknown period. It says the Court's decision effectively delays the hearing for an indeterminate period because the 31 July adjournment date is expressly not the date for resumption of this case.

[22] The Respondents essentially say that all the Court did was to delay the hearing of this case for a few months while negotiations were undertaken by the Crown and Whanganui iwi. It says the position is analogous to such cases as *Kersten v Stack* (supra); *Chef & Brewer Bar & Cafe Ltd v Police* [1994] NZAR 428. The Respondents therefore submit Genesis has no right adversely affected by the Environment Court decision to adjourn. The Respondents submit that the timetable was subject to change as circumstances directed. And the Respondents say the "right" to have the case dealt with as soon as practicable is subject to the final words of s272(1) of the Resource Management Act as follows:

"272 Hearing of proceedings

(1) The Environment Court shall hear and determine all proceedings as soon as practicable after the date on which the proceedings are lodged with it unless, in the circumstances of a particular case, it is not considered appropriate to do so."

[23] Finally Genesis points out that they were successful before the local authority. They have an existing "consent" which is subject to appeal and is suspended when an appeal is filed and while it waits to be heard. I note that while most of the consents sought are similar to the existing consents there are some different aspects including some public interest recreational advantages claimed. In the meantime, the originally granted consents subsist until the appeal is resolved.

[24] I consider on the facts of this case there is a reviewable decision of the Court. This case is not simply akin to the adjournment of a criminal case which typically can be easily heard (without prejudice to anyone) at a later date. There is no right to a hearing on a particular day, but there is to "speedy trial" consistent with other resource claims. Here I consider the adjournment grant did affect a range of rights, liabilities and benefits. Firstly, significant time and energy and expense have gone into the January 2003 date. This again was not simply a criminal case with a few witnesses that can easily be delayed a few weeks to be heard. This was a 20 week hearing spread over six months. It was actively case managed by the Court. Witnesses had rearranged their lives to appear. And the Applicant had an entitlement arising from the decision of the local authority who granted the consents (subject to conditions). Although the appeal before the Environment Court is a rehearing de novo Genesis has an existing decision in its favour. If the appeal was abandoned the order would apply. The fact that the Resource Management Act provides for suspension of orders made pending appeal illustrates the existence of an entitlement. And more broadly in a case such as this witnesses' availability will inevitably be affected by an adjournment. Again, this case can be distinguished from a simple criminal/civil case with a few witnesses who can readily be available on a new date. This litigation also involves many expert witnesses from within New Zealand and overseas. Granting adjournments can significantly affect witnesses' availability especially when co-ordination of witnesses' attendance is

both pivotal and complex. I am satisfied that on the facts of this case the adjournment decision is within the definition of a statutory power of decision-making, and is therefore susceptible to review.

Reviewable Error

[25] The Applicant's case that the Judge made a reviewable error in granting the adjournment is based on two propositions.

(1) The decision to adjourn was effectively based on the Minister's letter. In particular the Court accepted the proposition that the Government would introduce legislation which would effectively nullify any Environment Court's decision in conflict with their settlement and thus the case should be adjourned to wait the prospect of the settlement and legislation.

(2) If the rationale of the Court's decision was (contrary to (1)) to adjourn the proceedings because settlement negotiations could confine the issues in the litigation and thereby reduce the hearing time, then this was unreasonable because it was based on vague and indeterminate undertakings in the Minister's letter.

[26] I can immediately deal with (2). If indeed the rationale for the adjournment was the prospect of settlement negotiations narrowing the issues for the Court and the parties, then this would be a reasonable and rational basis to grant such an application. The fact that the negotiations may be with the Government and the negotiations were not directly between all the parties to the litigation would not in my view matter. It will be for a Court to assess (in its discretion) whether it is better to delay, for a short period, the hearing of the case in the hope that the issues do become more closely defined and thus save time and expense for all. Short adjournments for this purpose can be profitable. In any event, if this was the rationale for the adjournment it is in my view well within the Court's discretion, it considers relevant matters, and would be reasonable in a judicial review sense. And it offends against no constitutional principle of separation of the executive and

judicial branches of Government. As I have said, the fact Government happens to be one of the negotiating partners in this context is irrelevant.

[27] However, if the reason for the adjournment was the Court's apprehension that it was pointless and a waste of resources for it to continue the hearing given the prospect of legislative change affecting Genesis' consent rights, then I consider the Court did fall into fundamental error.

The Law

[28] Prospective amending or validating legislation if inevitable can be a basis to defer a decision of the courts (see *Fitzgerald v Muldoon* [1976] 2 NZLR 615; *Turners & Growers Exports Ltd & Ors v Moyle* (HC, Wellington, CP 720-88, 15 December 1998, McGechan J)).

[29] This however is rare. The important principle is that the Court's function and that of Parliament and the Executive are obviously separate. The function of the Courts is to deal with its business on the law that applies when the case before it is heard. Expressions of legislative intent by Ministers are no more than that. The letter from the Minister herself expressly recognises that truth. The Minister's letter proposed no more than the possible introduction of legislation. For this to come to fruition and affect Genesis, the Government and iwi would need to agree on a settlement which affected Genesis consents. And Parliament would need to pass any bill introduced which gave effect to such a settlement. As the Minister earlier recognised, legislation would be required to effect Genesis' consents. It may be that the legislation would need to be retrospective.

[30] The principle against granting adjournments based on prospective legislation can be seen in such cases as *Ngai Tahu Trust Board v Attorney-General* (HC Wellington, CP553/87, 1 November 1989, McGechan and Greig JJ) and more recently in *Meggit Overseas Limited & Ors v Ned Grdovic* [1998] 43 NSWLR 527 where the New South Wales State Court of Appeal considered an adjournment based on the contents of a Ministerial announcement. Mason P observed:

> "The learned judge erred in taking into account the prospect of legislative amendment as a controlling factor in the decision granting the adjournment. The error was compounded by the apparent intent that the hearing date will, as presently advised, be deferred until the amending legislation is passed and the plaintiff becomes thereby entitled to take advantage of it. (page 529 at (g))
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> . . .
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> Does such announcement qualify in any way the judicial branch's obligation to uphold the existing - I emphasise the word "existing" - law? And does it enliven a power to grant a contested adjournment of proceedings fixed for hearing so as to enable one party to gain the benefit of proposed legislation to the detriment of another party? The answer to each question must be a categorical "no." (page 531 at (f)).
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> . . .
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> In my view, Judge Armitage erred in granting the contested adjournment of the fixed hearing date on the basis that he did. It is clear that his reason was to enable one party to the litigation to be in a position to take advantage of a legislative change, substantive and not procedural in nature that would accrue to that party's benefit. In so doing, his Honour contravened the principles which I have endeavoured to state. [page 536 at (c)]
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> . . .
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> If a court were to exercise a discretion to adjourn pending litigation by reference to the substantive benefits foreshadowed by proposed legislation, it would inevitably be drawn into the type of considerations referred to in the passage I have just quoted. A court of law cannot choose to favour one class of litigants over another without lawful authority. (page 537)"

[31] I therefore turn to consider the Judge's reason for the adjournment.

[32] The Judge in his decision did not identify whether he was granting the adjournment because the Minister had said she would introduce (depending on settlement) legislation affecting Genesis' consents, or because he thought the negotiations may narrow the issues for the advantage of all. Paragraphs 13-25 of his judgment contained his "determination". The content of paragraphs 17, 18 and 19, can be seen as favouring a reason based on legislative intervention. Paragraphs 24 and 25 seem to favour an adjournment based on settlement negotiations limiting issues for the Court and the parties. Other paragraphs, for example 22, could be seen as supporting either view. Overall, reading the determination section of the

judgment, I have the distinct impression it was the prospect of legislative intervention that mostly influenced the Judge. However the timetable he set (April 4 telephone conference, proceedings adjourned to 31 July 2003) made little sense if legislative intervention was the reason for the adjournment. The Judge would have been clear that there was no prospect of legislation passing by April 2003 nor probably by July 2003.

[33] However, I repeat, that overall in the determination section of the judgment I have the distinct impression that it was the prospect of legislative intervention that mostly swayed the Judge.

[34] Because of the view I take as to the exercise of my discretion whether to grant a remedy, I do not have to decide this question finally. In taking the view I do as to my discretion in this case, I am conscious of the principle that where there is a right there should be a remedy.

[35] However, the following factors convince me that even if I was satisfied that the Judge had made reviewable error by taking into account prospective legislative intervention in the exercise of my discretion I would not have granted review here. These factors are:

(1) There was (and the Judge touched on it) a reasonable rational basis for a short adjournment of this case. This was the negotiations between Government and Whanganui iwi which do have the prospect of reducing the issues and thus potentially reducing the significant costs of such litigation. The fact the Government only recently indicated their preparedness to negotiate in this way is relevant. Therefore the lateness of the adjournment application was hardly the responsibility of the Whanganui tribes.

(2) Although Genesis will have consideration of its new "consent" grants delayed it has existing rights which mostly parallel its new consents.

(3) The Court made it clear that this was a limited adjournment and further indulgences beyond July could not be expected. I make the observation that the Respondents seem already to have had considerable indulgence by the Court given their failure to adhere to case management directions.

(4) The Court has already filled some of the time previous available, for hearing this case although exactly how much hearing time is still available in the first six months of next year is not entirely clear. In any event, a start date on 20 January now seems impossible. I acknowledge, as I have said, that this is in part due to the tardiness of the Respondent in obeying case management directions.

[36] These factors influence me such that even if I was convinced the adjournment had been granted on improper and reviewable grounds, I would not have given relief. I am conscious that I could simply quash the decision of the Environment Court and invite it to reconsider the adjournment application based on the negotiations between Government and iwi potentially saving cost and time to the Court and the parties. Given the Judge's attitude as revealed in his decision to grant the adjournment the new application for adjournment would inevitably be granted. It would then be based on more solid grounds which in my view would not be susceptible to review. To ignore this obvious reality would in itself be unreal.

[37] In coming to this conclusion, however, I wish to stress the following.

(1) The purpose of granting the adjournment would be to allow the Crown and iwi to negotiation matters relating to the Whanganui River claim with the prospect that it may narrow the issues for the parties and the Court and thereby save cost to all.

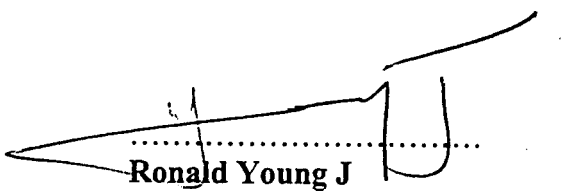
(2) There, obviously comes a time when delay in the hope of negotiations narrowing issues will be greater than the delay caused by litigating the full case. It seems obvious that this date will be reached should the case be delayed beyond July next year.

(3) This is not one of those rare cases where legislative intervention is inevitable such that the principle that courts should decide the case before them based on the law as it exists on the day of hearing should be set aside. This is a fundamental principle in the proper functioning of the courts.

(4) One of the difficulties in the present case is the lack of evidence revealing exactly what issues may be negotiated between Government and Whanganui which may narrow the issues for consideration by the Court. In the highly unlikely event that any further application for adjournments were made or seriously considered by the Court, detailed information illustrating how issues could be narrowed and time saved would be essential.

[38] I therefore refuse the application for review of the Environment Court's decision to grant an adjournment.

[39] I invite memoranda as to costs by the parties. To assist, I do not consider that this is necessarily a case where costs should follow the event. The Applicants had considerable strength to their case.



Ronald Young J

Signed at 4-15 am/pm this 17th day of December 2002