IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-877
[2013] NZHC 2608

UNDER	the Hazardous Substances and New Organisms Act 1996 and Part 20 of the High Court Rules
IN THE MATTER OF	a determination of the Environmental Protection Authority made under s 26 of the Hazardous Substances and New Organisms Act 1996 in relation to application APP201381
BETWEEN	THE SUSTAINABILITY COUNCIL OF NEW ZEALAND TRUST Appellant
AND	THE ENVIRONMENTAL PROTECTION AUTHORITY Respondent
	DOW AGROSCIENCES LLC Applicant/Interested Party

Hearing: 2 October 2013

Counsel: M S R Palmer and F E Geiringer for Appellant
K M Muller for Respondent
P J Radich and J R Caldwell for Applicant/Interested Party

Judgment: 8 October 2013

JUDGMENT OF GODDARD J

This judgment was delivered by me on 8 October 2013
at 3.30 pm, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Terry IP for Appellant
Crown Law Office, Wellington for Respondent
Minter Ellis Rudd Watts for Applicant/Interested Party

Introduction

[1] The appellant, the Sustainability Council of New Zealand Trust, has lodged an appeal pursuant to s 126 of the Hazardous Substances and New Organisms Act 1996 (the Act) against a determination of the Environmental Protection Authority (the Authority) under s 26 of the Act, dated 19 April 2013, and notified on 23 April 2013.

[2] The appeal is the first against a determination under s 26 of the Act and the first to consider the scope of reg 3 of the Hazardous Substances and New Organisms (Organisms Not Genetically Modified) Regulations 1998 (the 1998 Regulations).

[3] The determination was applied for by New Zealand Forest Research Institute Limited (Scion). Scion is not and does not wish to be a party to this appeal.

[4] Dow Agrosciences LLC (DAS) has applied for an order to intervene in the appeal as an interested party with limited rights. These include the right to appear and present submissions at the hearing of the appeal. DAS does not qualify as a party entitled to appear and be heard on the appeal because it was not a party to the proceeding before the Authority and did not make a submission. It was not aware of Scion's application to the Authority at the time it was made, as the application was not publicly notified.

[5] There is no requirement for public notification of applications under s 26 of the Act. However, as the appellant has expressed an interest in the subject technology and had previously contacted the Authority to inquire into its position on the technology, it was advised of Scion's application and given the opportunity to make a submission to the Authority, which was received and considered.

[6] The appellant is opposed to DAS's application for intervener status and the Authority adopts a neutral stance in relation to it.

[7] The appellant and the Authority have both filed their submissions on the substantive appeal and also affidavit evidence, the latter with the intention of providing the Court with assistance as to the meaning of relevant scientific terms. This is an aspect I will come back to.

The Authority's determination

[8] The decision required of the Authority was "to determine whether organisms resulting from the use of ZFN-1 and TALEs are genetically modified organisms (GMOs) for the purposes of the Act".

[9] The Authority's decision was as follows:

> The Environmental Protection Authority (EPA) determined under section 26 of the Hazardous Substances and New Organisms (HSNO) Act 1996 (the Act) that organisms resulting from the use of Zinc Finger Nuclease type 1 (ZFN-1) and Transcription Activator-Like Effector nucleases (TALEs) are not considered genetically modified, and therefore, are not new organisms for the purposes of the Act.

[10] The Authority set out in a clear and logically sequenced manner the essence of its decision-making process, which necessitated a two-step determination: first, whether the use of ZFN-1 and TALEs results in organisms in which the genes or genetic material have been modified by *in vitro* techniques; and if so, whether those techniques are excluded by the Regulations.

[11] Authority staff had considered that ZFN-1/TALEs could be regarded as analogous to either chemical mutagenesis or genetic modification. However, given the high degree of *in vitro* manipulation required by ZFN-1/TALEs, the staff recommended that these techniques should be considered as more similar to genetic modification techniques, and thus not exempted by the Regulations.

[12] The Committee appointed by the Authority to hear and decide the application reviewed the staff's advice and also obtained and considered feedback from Scion on that advice. Noting that the ZFN-1 and TALEs techniques show close similarities to both chemical mutagenesis and genetic modification, the Committee found the techniques more similar to chemical mutagenesis.

[13] In relation to the Regulations, the Committee noted these exclude products of chemical mutagenesis from consideration under the Act and considered they should not be interpreted as an exhaustive list. The Committee's opinion was that techniques that are comparable and sufficiently similar to those listed in the Regulations should also be excluded, and organisms arising from them should not be considered genetically modified organisms. On that basis, the Committee determined that organisms arising from use of techniques using ZFN-1 and comparable TALEs technology are exempt under the Regulations.

[14] The Committee noted, however, that their decision highlighted the need for a review of the Regulations, as these are "not keeping pace with a rapidly evolving field of science". The Committee consequentially recommended that the Regulations be reviewed "to improve their clarity".

[15] My purpose in traversing the Authority's decision in some detail at this point is to assist in understanding whether the Authority's concerns as expressed are relevant to determining if the question of law posed for this Court requires the assistance of an intervener or an amicus. A related matter of equal concern is whether the question on appeal to this Court is solely a question of law or whether it is a mixed question of law and scientific fact. On my reading of the file, there appears to be an issue in relation to that question and also an issue in relation to the manner in which the parties' preparation for the appeal has evolved.

The appeal

[16] Section 126(1) of the Act provides for an appeal to the High Court on a question of law as follows:

> **126 Appeal on question of law**
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> (1) Any—
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> (a) Party to any application for an approval or an application under section 26 of this Act or regulations; or
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> (b) Person who made submissions to the Authority on any application for an approval or an application under section 26 of this Act or regulations—

> may appeal against the decision of the Authority to the High Court on a question of law ...

The question of law

[17] The question on appeal to this Court is stated as follows:

> (a) the Authority was wrong in law to determine that organisms arising from the use of mutagenic techniques using ZFN-1 and TALEs technology are exempt by cl 3(1)(b) of the Hazardous Substances and New Organisms (Organisms Not Genetically Modified) Regulations 1998 (the "Regulations") from the definition of a genetically modified organism contained in s 2(1) of the Act, because:
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> (i) the determination is inconsistent with the requirement in s 2(1) of the Act that exemptions to the definition of a genetically modified organism must be "*expressly* provided" by regulations;
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> (ii) the determination is inconsistent with the precautionary approach dictated by s 7 of the Act;
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> (iii) the determination is inconsistent with a correct reading of the words of cl 3(1)(b) of the Regulations, and, in particular, the Authority was wrong to conclude that it "should not be considered as an exhaustive list";
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> (iv) the approach taken by the Authority leaves it with a discretion not envisaged by the Act and is inconsistent with the Authority's role under s 26 of the Act; and/or
>
> (v) otherwise the Authority incorrectly interpreted the Regulations and the Act, or incorrectly exercised its role under s 26 of the Act.

Exclusion of the High Court Rules

[18] Section 126(3) of the Act provides that "an [a]ppeal under this section shall be made in accordance with the High Court Rules, except to the extent that those rules are inconsistent with sections 127–134".

Who may appear on an appeal?

[19] Sections 128 and 129 provide for the right to appear and be heard on an appeal to the High Court and who may be a party to an appeal, as follows:

128 Right to appear and be heard on appeal

(1) A party to any proceedings, or any person who made submissions to the Authority, and who wishes to appear and be heard on an appeal to the High Court, shall give notice of his or her intention to appear to—

(a) the appellant; and

(b) the Registrar of the High Court; and

(c) the Authority.

...

129 Parties to appeal before High Court

(1) The parties to an appeal before the High Court are the appellant, the Authority, and any person who gives notice of intention to appear under section 128.

...

Should DAS be accorded intervener status?

[20] Mr Palmer opposed DAS's application to intervene in this appeal on two main grounds: first, that the according of such status is precluded by operation of law, being statute barred; second, that indirect reliance on the High Court Rules, or reliance on the inherent jurisdiction or inherent power of the High Court, to grant DAS intervener status, would be inappropriate for a number of reasons.

[21] The first ground of opposition advanced is critical. In relation to this, Mr Radich argued that the Court has jurisdiction to grant DAS intervenor status by virtue of its inherent powers to join an "interested party", citing the decision of Associate Judge Abbott in *Sanofi-Adventis Deutschland GmbH v AFT Pharmaceuticals Ltd*.[1] Mr Radich cited further examples of cases in which he submitted the High Court has used its inherent powers to join various entities as interested parties or interveners. These authorities include *Golden Bay Marine Farmers Consortium Ltd v Tasman District Council*,[2] *Westhaven Shellfish Ltd v*

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1 *Sanofi-Adventis Deutschland GmbH v AFT Pharmaceuticals Ltd* High Court Auckland CIV-2009-404-1795, 9 August 2011 at [18].

2 *Golden Bay Marine Farmers Consortium Ltd v Tasman District Council* High Court Nelson CIV-2005-442-451/CIV-2005-485-1144, 19 December 2006.

Chief Executive of Ministry of Fisheries,[3] and *Wilson v Attorney-General [Judicial Conduct] (No 2)*[4].

[22] Mr Radich said the criteria identified in these cases as relevant to including an entity as an interested party are not exhaustive. There are a significant number of decisions, in judicial review in particular, where interested parties have been added in circumstances where their interests might be affected by the impugned decision.[5]

[23] Mr Radich further submitted that in commercial proceedings the primary criteria that have been applied are whether the party seeking to be joined has a clear, relevant interest in the proceeding and whether that party can add anything to the argument of the existing parties on the issues the Court has to decide.

[24] Mr Radich further referred to and relied on an alternative formulation advanced in *Westhaven Shellfish Ltd*,[6] to support the argument that it would be unjust to decide the issues in the absence of DAS as an interested party. Mr Radich also referred and relied on the decision in *Diagnostic Medlab Ltd v Auckland District Health Board*,[7] in which the High Court referred to the Court's inherent powers to join a party in circumstances in which it considers the Court will be assisted by the perspective of the intervener.

[25] Applying these principles to the situation of DAS, Mr Radich pointed to the following as factors in favour of its being granted intervener status: that there is no true respondent in this appeal and DAS is able to provide real assistance to the Court because it has the ability to bring factual and legal arguments that the Court will not otherwise have the opportunity to hear; DAS has been involved in discussions with international regulators and has a broad understanding of the ways in which these bodies have approached the regulatory status of products developed through this type of technology; and DAS is the only party with a direct interest in the case, as it has

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3 *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* (2002) 16 PRNZ 501.
4 *Wilson v Attorney-General [Judicial Conduct] (No 2)* [2010] NZAR 509.
5 Including *Deadman v Luxton* High Court Wellington CP71/99, 4 May 1999.
6 At [19]–[20].
7 *Diagnostic Medlab Ltd v Auckland District Health Board* High Court Auckland CIV-2006-404-4724, 18 October 2006 at [28].

proprietary rights in the technology in question[8] and will be affected by the decision. In the latter regard, it appears that DAS is currently filing for patent rights internationally, including in New Zealand, to produce products made from the ZFN-1 technology.

[26] In support of its application, DAS has filed an affidavit sworn by Mr Rudgers, the Global Regulatory Leader of DAS, inter alia annexing a summary of decisions and opinions by regulators in Australia, the United States of America and the European Union relating to the regulatory status of products developed through ZFN-1 technology.

Discussion

[27] I deal directly with the question of whether DAS's application to intervene in this appeal is statute barred by virtue of the closed category of parties to an appeal under s 126 and the express exclusion of the High Court Rules where those rules are inconsistent with ss 128 and 129, providing for the right to appear and be heard on an appeal to the High Court.

[28] The categories of persons who have the right to appear and be heard on an appeal to the High Court are precisely stated in ss 128 and 129. When coupled with the exclusion of the High Court Rules to the extent they are inconsistent with that; and when regard is had to the absence of a requirement to publicly notify applications under s 26 (as opposed to other applications in Part 5) of the Act, a strict interpretation is clearly required and the category must be regarded as closed.

[29] None of the authorities to which Mr Radich referred were either concerned with, or focused on, such clearly stated and exclusionary provisions specifying a class of parties. An exception may have been the decision of Ronald Young J in *Bay of Plenty Energy Limited v Todd Energy Limited*,[9] although an examination of the statute in that case was not a feature of the decision and the outcome turned on different issues. Most of the authorities referred to and relied upon concerned

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8 DAS has an exclusive licence to use the ZFN-1 technology in plants globally.

9 *Bay of Plenty Energy Limited v Todd Energy Limited* High Court Wellington CIV-2011-485-1371, 22 August 2011.

judicial review applications and thus a different and wider context concerning rights and liabilities that might be affected. None of the authorities cited has persuaded me that there is a discretion in the Act given its very specific provisions for party status in appeals under s 126.

[30] The inherent power of the Court to regulate its own procedure by permitting intervention to occur in circumstances where it considers that it will be assisted by the perspective of the intervener has, in my view, effectively been ousted by the statutory scheme in this case.

[31] In any event, and in case I am wrong, I would not exercise my discretion to grant intervener status to DAS in this appeal. There are two main reasons for this: the first is that DAS's application to intervene is very late and the hearing date is close. DAS has apparently been aware of the appeal proceedings since 21 June 2013; the second is that DAS is seeking to adduce scientific analysis in order to explain the scientific technology at issue and this appeal is confined to a question of statutory interpretation. As I have adverted to in [15] above, there is already an element of this in the evidence adduced by both the appellant and the respondent which will need preliminary determination. I will refer to this aspect again shortly.

[32] DAS's application for intervener status as an interested party is therefore declined. In so declining, I do not overlook the evidence that DAS has experience in the area of regulatory conclusions and opinions in comparative jurisdictions; or that Crown Law has referred to the desirability of these comparative international decisions being placed before the Court. This is a further matter that might favour the appointment of an amicus, who could provide the Court with an international perspective to the appeal that will otherwise be absent.

Is the argument before the Court currently confined to interpretation and application of the law?

[33] Counsel for the appellant and respondent have filed their submissions for the appeal as directed. Affidavits containing evidence from scientific experts have also been filed by both parties. This evidence was initially put forward to provide the Court with assistance as to the meaning and use of relevant scientific terms in reg

3(1)(b) of the Regulations and in related documents; that is to assist the Court with scientific definitions that are "true and accurate representations of the complex scientific concepts described".[10] However, on my reading of the affidavits they are not limited to the mere interpretation or use of the relevant scientific terms, but are also purporting to venture into argument about the critical features of the scientific techniques that bring them within the criteria in s 2A(1) of the Act (ie within the description of a genetically modified organism) – or otherwise. Examples of competing opinions about this are to be found in the affidavit evidence of both Dr Dijkwel and Dr Heineman. Objection has been taken by counsel for both parties to portions of these deponents' respective affidavit evidence. The admissibility of this questionable evidence has not yet been determined, although it was to have been determined pre-trial. The fixture for the hearing of the appeal is 6 November and there may now be insufficient time in which to determine the admissibility issue prior to that date. Therefore, the Court may well benefit from the assistance of an amicus for that reason also.

An amicus?

[34] The Authority does not wish to make submissions on the appeal as if an adversary. It simply wishes to appear to inform and assist the Court on matters of interpretation and application of the legislation, in particular in relation to:

(i) the appropriate approach to interpretation of reg 3(1)(b);

(ii) the relevance of New Zealand's international obligations and the extent to which they assist with the resolution of the proper approach to the interpretation of reg 3(1)(b); and

(iii) the relevance of the precautionary approach (as set out in s 7 of the Act).

[35] Ms Muller advised that the Authority would welcome the Court having the assistance of an amicus, particularly in relation to the provision of the decisions and

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[10] Affidavit of Mr McManus.

opinions of regulators in comparative jurisdictions. While regulators in those other jurisdictions have reached conclusions and issued opinions about ZFN-1 and TALEs techniques not producing genetically modified organisms and not being subject to regulation as a result, the Authority would appear to be the first regulator to have issued a decision on the point following a formal process. An amicus would be in a position to put such information before the Court on appeal if that would assist the Court, whereas counsel for the Authority feels unable to do so. As I have declined to grant DAS intervener status, its evidence about these international decisions cannot form part of the appeal either.

Result

[36] DAS's application to be joined as an intervener is declined.

[37] Counsel may submit memoranda as to costs, if appropriate.

Goddard J