Justin Smith
Barrister

2 June 2010

Bennion Law
Solicitors
PO Box 25433
Wellington, 6011

Attention: Tom Bennion

Re: SC 38/2010: AgResearch Limited v GE Free NZ and Environmental Risk Management Authority

Please find enclosed by way of service submissions of first respondent opposing leave in the above matter.

Yours faithfully

Justin Smith.

STOUT STREET CHAMBERS 1ST FLOOR OLD PUBLIC TRUST BUILDING, CNR LAMBTON QUAY & STOUT STREET PO BOX 5722, WELLINGTON 6145
TEL +64 4 917 1080 FAX +64 4 917 1081 CELL +64 21 332 512 EMAIL JUSTIN.SMITH@STOUTSTREET.CO.NZ WEB WWW.STOUTSTREET.CO.NZ

IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2010

UNDER	the Hazardous Substances and New Organisms Act 1996 and under the Judicature Amendment Act 1972
AND	
IN THE MATTER	of an appeal of the decision of the Court of Appeal in proceeding CA 380/2009
BETWEEN	**G E Free NZ In Food And The Environment Incorporated** Appellant
AND	**AgResearch Limited** First Respondent
AND	**Environmental Risk Management Authority** Second Respondent

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SUBMISSIONS OF FIRST RESPONDENT OPPOSING LEAVE
2 June 2010

Solicitor Acting;Scott Mataga
Group Manager Legal Solicitor
Private Bag 3115
Hamilton
Tel: 64 7 8346646
Fax: 64 7 8346640
Scott.Mataga@agreseach.co.nz

Counsel Acting: J B M Smith
Stout Street Chambers
PO Box 117
Wellington
Tel: 64 4 9171080
Fax: 64 4 9171081
Justin.Smith@stoutstreet.co.nz

The matters in respect of which leave is sought

1. There are two matters in respect of which leave is sought:

(a) whether the first respondent's applications for approvals under the Hazardous Substances and New Organisms Act 1996 ("Act") complied with section 40 of the Act, and

(b) if not what, if any, are the consequences [1],[2].

The criteria for leave

2. The criteria relied upon are those in section 13(2)(a) and (b) of the Supreme Court Act 2003: general or public importance and general commercial significance.

General or public importance

Introduction

3. The first respondent addresses general or public importance in two ways.

4. First, it is contended that the issue in this case is only one of forum and timing for the airing of the appellant's concerns. Was judicial review appropriate or should the matter have been left to the specialist statutory body established under the Act to deal with such issues? That question, it is submitted, does not carry general or public importance.

5. Secondly, even if the substantive issue of compliance with the Act should have been addressed by the Court, that issue, in the circumstances, is still not one of general or public importance.

(a) *First point: Judicial Review appropriate?*

6. Viewed properly, this case only indirectly concerned statutory compliance. The matter directly in contention was when and by whom an issue of statutory compliance should be determined. That is, should an issue of whether the contents of applications for approvals complied with the Act be determined by way of judicial review in the High Court? Or

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[1] However these matters are expressed differently as between the application for leave and the submissions; see paragraph [6] and [29] of the application and submissions respectively

[2] The appellant presumably accepts that non-compliance does not as a matter o law amount to invalidity in all cases: *London & Clydeside Estates Ltd v Aberdeen District Council* [1979] 3 All ER 876 (HL).

should it be determined by the Environmental Risk Management Authority ("Authority") when:

(a) the Authority, being the body established by the Act to consider such applications, had not yet considered the subject applications, and

(b) that body has the specialist expertise necessary to determine the identification of the organisms involved (identification being the compliance issue) and all other relevant issues, and

(c) by contrast, the High Court, on an application for review, did not possess that expertise, and

(d) there is nothing in the Act suggesting that such applications will be dealt with by the Authority other than substantively (i.e. there is no procedure for the Authority to vet applications as a preliminary process prior to them being accepted for processing substantively), and

(e) the appellant (like any submitter) has a statutory right to be heard on applications before the Authority when it can make exactly the same points that it would make on judicial review (except to a quasi judicial body which is specifically established to understand and deal with those points), and

(f) in any event, if the Authority falls into error (legal error, unreasonableness, or breach of natural justice) the appellant still has a right of statutory appeal and/or may seek judicial review.

7. It is submitted that, viewed in this light, the case does not raise a matter of general or public importance. It is of no particular importance to determine whether these applications may be judicially reviewed before they are considered at all by the Authority as opposed to leaving them to be substantively considered by the Authority when there is a statutory right for the appellant to be heard when the Authority deliberates. This is so particularly when there is a statutory right of appeal from the Authority's decision. Indeed, there is the right to judicially review its substantive decision instead of, or in addition to, appeal.

8. The Court of Appeal held at various points that the disposition of the case came down to suitability of the forum and timing for the appellant's

points to be aired in terms of the statutory expectations as to when compliance would be assessed, and the ability of the Court on review (as opposed to the Authority) to decide the points raised by the appellants. There was, in particular, no requirement or even ability for the Authority to vet applications before accepting them or "registering" them. That was a mechanical process of insufficient moment to warrant judicial review. The validity/compliance issue is either required to be or is best left to be addressed by the Authority when it carries out the processes leading up to and inclusive of substantive determination[3].

9. Accordingly, the appellant failed in the Court of Appeal not on its substantive point but, rather, because the Court concluded that in all the circumstances the compliance/validity issue should be raised on the substantive consideration of the application by the Authority (or on subsequent appeal or review).

10. It is submitted that is a correct determination. But, correct or not, the issue determined is not one of general or public importance. That is because all that is addressed is the timing and forum for considering the plaintiff's substantive issue: not the substantive issue itself.

(b) *Second point: Assuming the issue of compliance can or ought to be addressed by way of Judicial Review*

11. The appellant may contend that since it brought an application in the High Court for judicial review in order to impugn non-compliant applications it is entitled to pursue its High Court proceeding rather than relying on its statutory rights of hearing and appeal (and post substantive determination judicial review).

12. Accordingly, it would say, the substantive issue of compliance itself is the "matter" for appeal: not the issue of where and by whom compliance (or otherwise) is determined.

13. Even if that is right, it is submitted that leave should still be declined for the following reasons:

(a) First, for the reasons, already described, the issue of compliance with the requirements of section 40 of the Act can be addressed at the substantive hearing of the applications before the Authority, or on subsequent statutory appeal (or review). This deprives even the substantive issue of compliance of any public or general importance at least <u>at this stage</u>. At a later stage (for

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[3] See Court of Appeal judgment [35], [48], [55] – [60].

example on an application for leave to appeal to the Supreme Court stemming originally from a statutory appeal to the High Court) an issue of public or general importance may, depending on the circumstances, arise.

(b) Second, in any event, it is submitted that the Court of Appeal was right. ERMA has no statutory obligation to vet or check applications before accepting them for processing: that is not envisaged by the Act (CA [55]). A more "nuanced" approach is envisaged by the Act, namely that applications are or may be subject to a number of discretionary statutory processes relating to further information (CA [57]). There is no exercise of a statutory power of decision making which is available for review (CA[59]). Outside of very clear cases (for example where the non-compliance is patent, requires no expert investigation to determine, and is fatal to the validity of the application) it is not helpful for the Court to attempt guidance at this stage by way of judicial review (CA [60]). The fact that the Court of Appeal was clearly right is a matter going to the grant of leave to appeal[4].

(c) Thirdly, for additional reasons to those expressed by the Court of Appeal, (notice is hereby given under Rule 20A) the appellant ought not to succeed:

(i) Even if the applications did not comply with Section 40 of the Act, a question remains as to the consequences of that non compliance: is the consequence that the applications are invalid or is there some lesser consequence? Or is there any consequence?[5]

(ii) The point of organism identification in applications is to enable the Authority to carry out an assessment of effects of the applications as required by section 45 of the Act.

(iii) There was clear expert evidence that the Authority would be able to carry out that assessment even if the applications did not comply. If, despite any non-compliance, the reassessment of effects could be carried out it is unlikely that Parliament would have intended the consequence of non-compliance to be invalidity of the applications.

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[4] *Prime Commercial Ltd v Wool Board Disestablishment Co. Ltd* (2006) 8 PRNZ 369
[5] *London & Clydeside* cited at para 1 above at 883 per Lord Hailsham

(iv) In the event that because of non-compliance the assessment of effects could not be completed then the application(s) would either have to be declined or amended not purely because of non-compliance but because of the effect of non-compliance.

(v) Whether or not an assessment of effects (which is a scientific issue) could be carried out was a matter the High Court could not determine on judicial review. Nor could the Court of Appeal or the Supreme Court. It was best left to the Authority (which possesses the skills and experience to do so) to make that decision as part and parcel of the substantive decision making process.

14. It follows that it would have been extremely difficult, if not impossible, for the High Court on judicial review to conclude that the assessment of effects required under section 45 of the Act could not be carried out. That being so it was not realistic to expect the High Court to have formed a view as to the consequences of any non-compliance. The appellant's proceeding inevitably had to fail for that reason. That, again, goes to the question of leave in the present application.

General commercial significance

15. It is submitted that compliance with the requirements of section 40 of Act it is not a matter of "general commercial significance". The cost of compliance is no doubt of importance where the first respondent's operating expenses are concerned and also, no doubt, to other entities which seek approvals under the Act from time to time. But that does not amount to general commercial significance in the sense intended by the Supreme Court Act.

Specific Points made by the appellant

16. In paragraphs 31 to 37 the appellant contends the effect of the Court of Appeal judgment is that applications under the Act cannot be challenged for want of compliance of the Act. It is submitted that contention has no merit. Applications can always be challenged before the Authority under the provisions of the Act expressly providing for this[6].

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[6] Section 54: Submissions on applications, Section 60: submitters may insist on oral hearing, Section 61: hearings involve rights to adduce evidence, address the Authority and to cross-examine or question witnesses (latter is discretionary), and section 126: right of appeal on question of law

17. In challenging an application for approval's validity before the Authority the same points as may be taken on judicial review may be made before the Authority. If an approval application to the Authority is invalid for want of compliance with section 40 of the Act then that point may be made just as well if not more appropriately before the Authority than it may be made on judicial review.

18. In paragraphs 38 to 40 of its submissions the appellant says that non-compliance is clear, does not need scientific expertise to recognise, and prevents compliance with notification obligations. All these points are and have been disputed.

19. In paragraphs 41 to 43 the desirability of public participation in applications for approvals under the Act is suggested as a reason why leave should be granted on the general or public importance ground. As to public participation, it should be remembered that of the four applications, only one was required to be publicly notified[7]. The other three were notified pursuant to the Authority's discretion.

20. The first respondent says that no risk to public participation arises making it particularly necessary to seek judicial review. If an application for approval is deficient in *any* respect then that is a point that may be taken by way of submission under the Act and sustained at a hearing of the application before the Authority. It may be sustained further on subsequent appeal under the Act. That is what the statutory provisions are for. There is no category of objection to an application for approval which a submitter is precluded from making by virtue of any provision of the Act.

21. Finally, the appellants refer at paragraphs 21 and 22 of their submissions to an Evaluation and Review report ("E & R report") by the Authority's staff suggesting that the assessment of effects required under section 45 of the Act cannot be carried out because of the generic description of the organisms in the applications for approvals. The E & R report is not the Authority's decision as the submissions correctly note. An applicant would be entitled to pursue its application for approval regardless of the contents of any E & R report. However, the first respondent does intend to amend its applications to provide more specificity. The only relevance of the E & R report obtained (under section 58 of the Act) is that the statutory processes in relation to dealing with applications for approval appear to be functioning as the Act

[7] See section 53(1)(d) – field test applications must be notified

intends including in relation to an issue arising as to adequate organism identification.

Summary

22. On an overall assessment the appellant has been seeking by way of judicial review a "pre-emptive strike" against the applications. Given:

    (a) the scope and purpose of judicial review, and

    (b) the absence of any power of statutory decision making allowing or requiring the Authority to vet or pre-screen applications for statutory compliance before accepting them for processing, and

    (c) the highly scientific nature of the subject matter, and the fact that the Authority is appointed for its special expertise in the area, and

    (d) the relative inability of the High Court to address these matters in the course and scope of judicial review, and

    (e) the statutory rights of objection or submission and appeal and the expectation that applications for approvals under the Act will be heard orally at the behest of any submitter at a full hearing,

    it is fundamentally unlikely that the appellants are right in their contentions or that their points are, in themselves, of public or general importance <u>at this stage</u>.

23. Emphasis is given to these words "at this stage" in the event that after the appellants have availed themselves of their statutory rights of submission, appearance and appeal there still remains a point which is amenable to judicial review under the Judicature Amendment Act.

Preferred dates

24. Counsel for the first respondent would prefer that a fixture for the leave application or any appeal not be allocated before September this year nor in the month of October.

Dated at Wellington this 2nd day of June 2010.

J B M Smith
Counsel for first respondent.