BUDDLEFINDLAY

17 June 2015

To
The Plaintiffs in the High Court Proceeding against Horowhenua District Council (CIV 2013-454-441)
c/- Philip Taueki and Anne Hunt

From
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By Email
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Tēnā koutou

CIV 2013-454-441 Philip Taueki & Ors v Horowhenua District Council

1. We refer to your memorandum dated 10 June 2015.

2. You say in paragraph 10 of your memorandum that:

   "Now that the substantive matter arising from this application has been settled, the attention of the Plaintiff can now turn to the relief sought."

3. Regarding the declaration sought relating to the Council resolution, the Council does not agree with the precise wording, but is open to discussing with you appropriate relief to that effect.

4. That will not by itself resolve the substantive matter as the claim is not limited to the Council resolution. You are also seeking a declaration that the 1973 agreement itself is invalid, which the Council disputes.

5. We are unsure from your memorandum whether, if we reach agreement on the Council resolution, you still intend to pursue your claim that the agreement itself is invalid.

6. To summarise the Council's position on this point:

   (a) As pleaded in paragraph 14(c) of the Council's statement of defence, the agreement is valid by operation of section 3(4) of the Public Bodies Contracts Act 1959.

   (b) In any event, the validity of the agreement is a live issue in the Maori Land Court proceeding, and as such it is a duplication of proceedings and an abuse of process to ask the High Court to determine the same issue. There is well-established authority against concurrent proceedings on the same subject matter being run in different courts.[1]

7. Also, you may be aware that under section 10 of the Declaratory Judgments Act 1908, the Court has a broad discretion to refuse to make any declaratory judgment or order. There are a number of

[1] In particular, see *Edwards v Edwards* [2012] NZHC 1630 and *Chaffey v Mount Cook Air Services Limited* [1969] NZLR 25.

established grounds on which the Court will generally refuse to make a declaration. Here, in addition to the matters referred to above, the Council will rely on the following grounds:

(a) A key party who would be bound by any such declaration (the Lake Horowhenua Trustees, who are a party to the agreement) is not represented in this proceeding.[2]

(b) As beneficial owners, you do not have standing to bring claims in nuisance or trespass, so any declaration will be advisory only.

(c) There are matters that remain in factual dispute[3] (namely, those relevant to section 3(4) of the Public Bodies Contracts Act 1959).

(d) A declaration would not end the litigation,[4] as there are a number of reasons as to why the drain is nevertheless lawful. For instance, in the Maori Land Court proceedings, in addition to relying on the 1973 agreement, the Defendant intends to rely in its defence upon other grounds to establish that the drain is lawfully in place, including estoppel and the 1974 and 2002 Local Government Act provisions governing drains and water courses.

8. The Council acknowledges that you will most likely dispute some or all of these claims. The key point is that the declarations you are seeking will not go to the heart of the issues between the parties or resolve them. Other issues will need to be determined still, and the High Court process will simply end up costing both parties more in terms of time, energy and money that could be better invested elsewhere.

9. For the same reasons, the Council considers that it is not liable for any costs in this proceeding. Rather, it considers that it has incurred costs unnecessarily, defending its position. The Council remains willing however (for the time being and without prejudice to its legal position) to agree that costs will lie where they fall if the proceedings are brought to an end by agreement as proposed. That is, the proceedings will be discontinued on the basis that:

(a) you will withdraw your claim that the agreement is invalid (without prejudice to any such claim in the Maori Land Court proceedings);

(b) the Council will confirm that, if the agreement was invalid, the Council's resolution did not validate the agreement retrospectively (and it will not argue that it did in the Maori Land Court proceedings);

(c) costs will lie where they fall; and

(d) these matters will be recorded in a consent memorandum to be filed in the High Court.

10. If you agree to these terms in principle, we would be happy to prepare a draft consent memorandum for your consideration.

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[2] *New Zealand Times Company (Limited) v Commissioner of Police* (1909) 29 NZLR 53.
[3] *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA); *IHC New Zealand Inc v Accident Compensation Corporation* [2008] NZAR 251.
[4] *Dairy Proprietary Association Inc v New Zealand Dairy-Produce Control Board* [1926] NZLR 535; *New Zealand Theatres Ltd v JC Williamson Picture Corporation Ltd* [1943] NZLR 383.

11. We would also be happy to discuss this matter with you if that would assist. May we have your response please by 19 June?

Nāku noa, nā

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