IN THE DISTRICT COURT
AT ROTORUA

I TE KŌTI-Ā-ROHE
KI TE ROTORUA-NUI-A-KAHUMATAMOMOE

CIV-2024-063-000364
[2024] NZDC 16999

BETWEEN	ROTORUA DISTRICT COUNCIL Plaintiff
AND	ROTOKĀKAHI BOARD OF CONTROL First Respondent
AND	PERSON/S UNKNOWN Second Respondent/s

Hearing: 16 July 2024

Appearances: K Cornege for the Plaintiff
S Northey for the First Respondent

Judgment: 17 July 2024

ORAL JUDGMENT OF JUDGE S R CLARK

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[1] What follows is an oral decision by me, concerning an injunction application that was heard yesterday, 16 July 2024. Given that this is an oral decision, I reserve to myself the right to make any amendments to that. However, the amendments will be limited to citations, spelling, grammar, punctuation and unfortunate or clumsy expression. Save for those exceptions, the substance of the decision will remain the same.

[2] It is with some regret that I must give an oral decision. That is simply a reflection of the roster in the District Court. There is simply no time, to give this matter proper consideration and prepare a written reserve decision.

Introduction

[3] The applicant in this case is the Rotorua District Council. They operate as the Rotorua Lakes Council (hereafter referred to as "RLC"). They are the territorial authority for the Rotorua District. RLC are responsible for the development of a wastewater reticulation scheme for the Lake Tarawera community. The scheme is known as the Tarawera wastewater reticulation scheme (the scheme).

[4] A key objective of the scheme is to replace all existing septic tanks in the Lake Tarawera catchment with a reticulated wastewater scheme. That involves the collection of wastewater from approximately 440 properties to an existing pumpstation at Ōkāreka. The wastewater is then to be diverted via a pipeline to a wastewater treatment plant in Rotorua.

[5] Stage 1 of the scheme started in April 2023. Part of stage 1 involves the construction of a wastewater pipeline travelling underneath a one-kilometre stretch of Tarawera Road. That road runs parallel to the northern bank of Lake Rotokākahi.

[6] Work on Tarawera Road started in late January 2024. At the time, there were people in the vicinity protesting against the infrastructure works. In late January, there were incidents involving traffic management measures which had been undertaken in association with the works, to which I will return later.

[7] RLC and their contractors were sufficiently concerned to cease work on 2 February 2024. Subsequently, RLC filed injunction proceedings on 16 May 2024. The injunction is sought pursuant to s 162 of the Local Government Act 2002 seeking to prevent interference with the pipeline works.

[8] The bed of Lake Rotokākahi and its constituent lands are Māori freehold land. The record of title identifier is 329298 (South Auckland). Those lands are vested in responsible trustees.

[9] The Lake Rotokākahi Board of Control (hereafter referred to as the "Board of Control") was constituted in 1926 by an Order in Council pursuant to s 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1923. The Order in

Council vested the control and management of the lake and its constituent islands in the Board of Control.

[10] The 1923 legislation is now repealed. However, the powers vested in the Board of Control continue by virtue of s 21 of the Māori Purposes Act 1931, which is still in force.

[11] The record of title, a copy of which appears in the casebook records as a memorial that the 1926 gazette notice constituting the Board of Control and vesting control and management in that Board of Control. [1]

[12] The Board of Control have taken the position before me that the lakebed is vested in themselves as the legal owners. That may not, strictly speaking, be correct. The Board of Control may simply have control and management functions in relation to the lake only. However, that is not a matter which I need to decide. A definitive answer to that question rests with the Māori Land Court, and I am content not to let that issue unnecessarily distract me.

[13] I accept that the Board of Control have, as their legal responsibilities, the control and management of Lake Rotokākahi. In that capacity, they appear as representatives and spokespeople for the owners of the lake. I also accept, of course, that they represent the mana whenua of the area, namely Tūhourangi and Ngāti Tumatawera.

[14] There would appear to be no demur to the fact that the Board of Control are representative of those who claim ownership in the lake. I can simply add yesterday when hearing this matter, the courtroom in the Māori Land Court in Rotorua was full to overflowing there was literally standing room only. There was no demur to the fact that the Board of Control was representing the owners of the lake.

[15] What is important in this case – and it is not contested – is that Lake Rotokākahi is tapu. The public do not have access to its waters, islands, and environs – only the

[1] Casebook p 371.

owners. It is considered a wāhi tapu and is of high historic and cultural significance to the peoples of Tūhourangi and Ngāti Tumatawera.

[16] The Board of Control oppose the pipeline passing through lands adjacent to their lake. They also oppose any injunction which would restrict their rights of access and interfere with a discharge of their kaitiaki responsibilities.

Background details

The scheme

[17] What follows is not a full iteration of the background. Nevertheless, I think it is necessary to set out some of the background in a little bit more detail.

[18] The Tarawera wastewater reticulation scheme is one of several reticulation schemes carried out in recent years to properties near sensitive lake waters in the Rotorua area.

[19] Discussions concerning the scheme have been ongoing since at least 2015. A preferred option was identified by a steering group which involves, as I have said earlier, the collection of wastewater from approximately 440 properties to an existing pumpstation at Ōkāreka and then diverted that via a pipeline to the wastewater treatment plant in Rotorua. The pipeline is intended to be laid in lands vested in the RLC as a road corridor. Contained within the road corridor is the formed road known as Tarawera Road. New pipelines are intended to be trenched underneath the surface of Tarawera Road, covering a distance of approximately one kilometre.

[20] Cultural impact assessments have been prepared prior to RLC finalising its decision to proceed with the scheme. The Board of Control have made their views clear in that they oppose the pipeline travelling via lands over which they are the mana whenua.

[21] The scheme is in two parts. Stage 1 involves the installation of a new reticulation network, including a pipeline, mains, and pumpstations. Stage 2 involves

the installation of low-pressure grinder pumps to all 440 properties and associated works to connect them to the mains network.

[22] The scheme has been included in the RLC long-term plan and its 2021 infrastructure strategy. It is partially funded by contributions from central government, regional council, and RLC itself.

[23] Contractual arrangements are in place. The lead contractor for the construction of the pipeline and associated works is Fulton Hogan. Their contract is, as I understand it, to end in October of this year. Therefore, I infer there is some pressure for stage 1 to be completed.

[24] Stage 1, as I have said, started on 18 April 2023. It is nearly complete, save for the one-kilometre stretch of Tarawera Road. I understand the situation is that once work stopped on Tarawera Road on or about 2 February 2024, work shifted to other sections of stage 1, and this is one of the last remaining stretches requiring completion.

The roadway

[25] As I have said, it is proposed that the pipeline is to be laid out within those lands vested in RLC as a road corridor, namely, Tarawera Road. Specifically, the pipeline is to be laid out along the landward edge of the roading corridor. This is an issue to which I paid some attention yesterday and had several discussions with counsel, particularly counsel for RLC. I am now satisfied, having read the reply evidence of Mr Mostert for the council, and having examined the survey maps attached which appear in the casebook, that the road corridor is indeed vested in the RLC.[2]

[26] That the road corridor or, indeed, Tarawera Road is legally vested in council is not in contest by the Board of Control. They, however, maintain they have mana whenua status in relation to those lands.

[27] In addition, there are a series of plans before the Court which show the location of the proposed pipeline.[3]

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2 Casebook 366-368 inclusive.
3 Casebook 377-379 inclusive.

The works

[28] The pipeline is to be laid out in what is referred to as a work zone. The work zone as shown on maps before me is toward the landward edge of the roading corridor and adjacent to Department of Conservation land, that is, further away from the lake edge. In addition to the work zone, there has been reference made to a proposed one metre buffer zone on the lake side of the work zone. It is over those areas that RLC seek an injunction. The work zone, buffer zone, and some of the traffic management measures are represented by plans put before the Court which appear in the casebook.[4]

[29] As I have said, the intention is to trench the pipeline underneath, in the main, the existing formed sealed road. There are, as with any civil construction works of that type, associated traffic management plans which have, as their intention, to protect the works and those working on the pipeline. Methods such as traffic cones, temporary fencing, closing of one lane of traffic and the installation of temporary traffic lights have, as I understand, been used to date, and are proposed to be used.

Consultation

[30] The Board of Control say that consultation carried out to date has not been adequate, nor have their concerns been listened to. They say that the requirements of consultation are heightened in this case, due to the fact that they are the legal owners of the lakebed, that the lake had sacred status, due to the historic and cultural significance of the lake, and their mana whenua status.

[31] In response, RLC say that they are aware of the level of opposition, which has been variously expressed in the cultural impact assessments; in a letter dated 30 November 2023 sent to council; by virtue of protest activity; having attended a community hui on 3 March 2024; and by receipt of a petition to an RLC subcommittee on 3 April 2024.

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4 Casebook 384-388 inclusive.

January 2024 incidents and aftermath

[32] Fulton Hogan started work in the vicinity of Lake Rotokākahi on 28 January 2024. Protest action started on 30 January comprising of people gathering on the side of the road. Signs were held by those protesting the works. There are some photographs before the Court showing the gathering of people which can be seen in the casebook.[5]

[33] It is important to state that simply gathering to protest and erecting signs are not activities which RLC relies on in support of the injunction application and nor could it, of course. The gathering and holding of signs-peaceful protest action is something which is entirely permissible and is protected by the New Zealand Bill of Rights Act 1990.

[34] However, RLC have put before the Court evidence in various affidavits referring to matters of concern, which I will now outline.

[35] There is an affidavit before the Court of Kenneth McLeod, who is the Rotorua branch manager of Fulton Hogan, who are the lead contractors. At paragraph 11, he refers to examples of incidents reported to him, including offensive protest slogans shouted by protestors, the deliberate running over of traffic management cones recorded on a dashcam, ignoring workers' directions and traffic management signals, people driving towards oncoming traffic requiring that traffic to take evasive action, and cars pulling out in front of Fulton Hogan vehicles, causing them to come to an emergency stop.

[36] I will pause here to note – and I will come back to this – that these are incidents which have been relayed to Mr McLeod ie, they are not from his direct knowledge. He has produced a USB stick that contains video footage taken from a dashcam from a Fulton Hogan vehicle. It does shows six traffic management cones being knocked over by a large four-wheel drive vehicle. I have some doubt about the weight of that. I say that because the date stamp on the video refers to 12 February 2024, outside the period we are examining. Therefore, I am a little unsure as to what to make of that.

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5 Casebook 051-052.

[37] In addition to that, there is an affidavit of Mr Neal Vanner. He is a director of Universal Underground. They are subcontractors, specifically specialist directional drilling company. He gives evidence at paragraph 5 of his affidavit of having been subject to verbal abuse from individuals which he linked to the protest whilst onsite. He says they were shouting at him from inside a vehicle. In and of itself, that is probably not too much to be concerned about, but he does go on to say in that paragraph that they had parked blocking the open lane of the road next to the worksite.

[38] Mr Michael, who is a general manager of infrastructure environment at RLC, has provided a comprehensive affidavit which talks a lot about the scheme, and its inception and background. In relation to the issue of the January incidents, his evidence comprises of what he has been informed by employees of RLC and reports from employees of Fulton Hogan. At paragraph 27, he says there has been intimidation of Fulton Hogan staff by protestors, interference with siteworks, threats and an escalation of interference to Fulton Hogan staff. He is aware that a complaint has been made to the police. At paragraph 29, he says that the behaviour of the protestors led to Fulton Hogan leaving the site on 2 February 2024. Mr Michael, again like many of the other witnesses, has not given direct evidence.

[39] There is an affidavit before the Court from Mr Connor Raimoana, who is a leading hand at Fulton Hogan. He gives direct evidence of an incident on 31 January 2024. Mr Raimoana talks about driving a Fulton Hogan vehicle along what is known as the "open lane", attempting to get into the worksite. I should add here that, as I understand the traffic management plan, it is one lane is closed whilst the other remains open and that the open lane is controlled by traffic lights for cars to avoid each other.

[40] Mr Raimoana gives evidence of seeing an oncoming vehicle moving towards him at speed from an opposite direction, that he needed to take evasive action to avoid it. He noted that a fellow Fulton Hogan worker who was driving a vehicle behind him also had to take evasive action, as did two to three other vehicles travelling behind his fellow worker.

[41] That is, in essence, the direct evidence that Mr Raimoana gave. He also goes on to give some more indirect evidence about talking to a stop/go operator on the radio about what had happened, and that somebody had ignored a red signal requesting a stop, and he heard similar complaints from fellow workers about similar incidents.

[42] On or about 2 February this year, an evaluation was made by Fulton Hogan that the incidents were of sufficient concern that their workers were endangered and that no further works would be carried out. It is at that stage that work in the Tarawera Road section of stage 1 of the scheme has ceased.

Aftermath

[43] On 7 and 9 February 2024, RLC wrote to the Board of Control offering a meeting. On 16 February 2024, the Board of Control posted a message on Facebook that it would engage with RLC. On 3 March 2024, there was a community hui which was attended by representatives of both RLC and the Board of Control. On 3 April 2024, the Board of Control presented a petition to a subcommittee of RLC. Suffice to say, notwithstanding those subsequent steps being taken after works ceased, it has not led to a resolution in the matter and the injunction application was filed on 16 May 2024.

Rotorua District Council submissions

[44] For the council, Ms Cornege has stressed that the scope of the hearing is narrow. This is not an appropriate case to examine the legality of decisions to proceed with the Tarawera wastewater reticulation scheme. Those matters and matters concerning the adequacy of consultation, the impact of the Treaty implications under the Local Government Act 2002, and tikanga are best left for different Court proceedings, perhaps by way of judicial review proceedings.

[45] In her submissions, Ms Cornege traversed the development of the scheme, the 2024 incidents, and outlined the various legal provisions in the Local Government Act that apply, in particular sections 162, 232, 316 and 317. She also discussed with me the evidence and status of Tarawera Road as a legal road.

[46] A major thrust of the RLC submissions is that the past January incidents and potential future incidents will stop and obstruct the wastewater works and associated traffic management measures and would be in breach of s 232 of the Local Government Act.

[47] In answer to questions from me as to whether the nature and quality of the acts complained of are sufficient to grant an injunction, Ms Cornege made the oral submissions – with which I agree – that the mere fact of protest, the mere fact that people are holding signs and are assembling on the side of the road are not what the council are seeking to rely on in support of an injunction. What they are concerned about are incidents that go to the safety of those employed or contracted by the council and that the council does not need to wait until there is a major incident or until issues have escalated. RLC needs to ensure their workers' safety whilst allowing for protest to continue. In January 2024, RLC, she says, had to decide to either pause or continue and run the risk that the situation escalated.

[48] Ms Cornege made the oral submission that as long as protest activity continues or opposition continues, it would be safer if an injunction was issued. She made the submission that the Board of Control does not control all actors and that some comfort is needed for the RLC contractors, and that it is necessary for the works to recommence if an injunction is granted. There are also some concerns on the part of RLC that contracts need to be completed by October and that government funding is dependent on works being completed in October.

[49] Ms Cornege went on to submit that the Court has jurisdiction to issue injunctions against persons who are unknown.

[50] In response to the Board of Control submissions, RLC say that injunction is not an unreasonable restriction on the public's right to use the road. It is not an unreasonable restriction on the rights and freedoms protected under the New Zealand Bill of Rights, namely, the right of freedom of expression set out in s 14, the right of freedom to peaceful assemble set out in s 16, and the right of freedom of association set out in s 17.

[51] RLC say that the Board of Control's heightened relationship with the lake and tikanga issues have not been ignored by RLC.

The Lake Rotokākahi Board of Control submissions

[52] Ms Northey presented the legal submissions for the Board of Control. She started by making brief submissions as to the history and importance of the lake. She was at pains to point out that those submissions were necessarily brief and do not do justice to the history and importance of Lake Rotokākahi.

[53] As the owners and kaitiaki of Lake Rotokākahi, the Board of Control have responsibilities to safeguard the lake. That encompasses safeguarding the mauri or life essence, of the lake and its physical and spiritual health in accordance with their tikanga.

[54] Fundamentally, the Board of Control oppose the pipeline running through their land. They say that the decision-making undertaken by RLC to reach a decision to proceed with the scheme was flawed and wrong.

[55] In relation to the narrower issue of the injunction, the Board of Control are also opposed to any injunction proceedings and say that the injunction would result in an unjustified limitation on them and their members' right to peacefully assemble.

[56] They are also concerned that any injunction would limit rights of access to the lake. As the arguments developed yesterday, an example of that was given when discussing access to the lake. As an example, from one of the photographs in the casebook,[6] what can be seen is a short road or path that leads off Tarawera Road towards the lake. I am informed that is one of two points of access to the lake. Shortly to the south of that, the Te Wairoa stream discharges from the lake. I was also informed – albeit from the Bar – yesterday that immediately across the road, which would be in the vicinity of the DOC land on the other side of the road, is where people park when accessing that part of the lake.

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6 Casebook 386.

[57] There is also a concern that the injunction will prohibit kaitiaki practices. There was concern that the terms of the injunction are too broad in that it lacks specificity about dates and timing, location, and definitions of the work zone.

[58] A submission has been made that this is a case in which there are, indeed, heightened obligations on RLC as a territorial authority to consider Treaty of Waitangi principles and tikanga, given the ownership of the lake and its status. That submission is made given the ownership, control, tapu status, and proximity to the lake and kaitiaki responsibilities the Board of Control have.

Legal framework

[59] Sections 162 and 232 of the Local Government Act 2002 state:

> **162 Injunctions restraining commission of offences and breaches of bylaws**
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> (1) The District Court may, on the application of a local authority, grant an injunction restraining a person from committing a breach of a bylaw or an offence against this Act.
>
> (2) An injunction may be granted under subsection (1)–
>
> (a) despite anything in any other enactment:
>
> (b) whether or not proceedings in relation to the breach or offence have been commenced:
>
> (c) if a person is convicted of the breach or offence, –
>
> (i) in substitution for, or in addition to, any other penalty; or
>
> (ii) in subsequent proceedings.
>
> …
>
> **232 Damage to local authority works or property**
>
> (1) This section applies in relation to the following works or property that are vested in, or under the control of, the local authority:
>
> (a) a protective work; or
>
> (b) a waterwork; or
>
> (c) a water race; or

(d) a drainage work; or

(e) anything forming part of, or connected with, any works or property not referred to in paragraphs (a) to (d).

(2) Every person commits an offence who wilfully or maliciously destroys, damages, stops, obstructs, or interferes with the works or property referred to in subsection (1) and is liable on conviction to the penalty set out in section 242(3).

(3) Every person commits an offence who negligently destroys, damages, stops, obstructs, or interferes with the works or property referred to in subsection (1) and is liable on conviction to the penalty set out in section 242(1).

[60] Section 162 of the LGA differs from corresponding provisions in the Local Government Act 1974, namely, ss 683(2) and 698, and the Town and Country Planning Act 1977, ss 173A and 36 of the Town and Country Planning Act 1953. The difference is that it is no longer necessary to prove that an offence or breach of any bylaw is a continuing offence.

[61] The onus of proof for an injunction is the civil onus, having regard to the gravity of the consequences. Where established, a Court should grant an injunction unless special circumstances apply, or the issue should be delayed in the interests of justice.[7]

[62] In this case, as a starting point, I must be satisfied on the balance of probabilities that a person or persons have:

(a) Offended against s 232(2) of the Local Government Act 2002 by wilfully or maliciously destroying, damaging, stopping, obstructing, or interfering with any works vested in or under the control of the RLC, or

(b) Offended against s 232(3) by negligently destroying, damaging, stopping, obstructing, or interfering with any works vested in or under the control of RLC; and

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7 *O'Sullivan v Mt Albert Borough Council* [1968] NZLR 1099; *Taranaki CC v Hammond* [1988] DCR 109; *Stanton v Heke* [2014] NZHC 3117 at [18].

(c) that an injunction is required to restrain any person or persons from committing one or both of those types of offences.

Discussion

[63] I am satisfied that the Tarawera wastewater reticulation scheme is not only under the control of RLC, but it is also taking place on land vested in it, namely, Tarawera Road, which is a public road.

[64] I am satisfied that the nature of the reticulation works to be carried out falls within s 232(1)(e), which is a catchall provision. That provision includes any type of works not specifically referred to in the preceding subparagraphs (a) through to (d) inclusive.

[65] I am not attracted by the submission of the Board of Control that "works" means completed infrastructure works and does not encompass works currently in progress. I reject that because there is no authority to support it but, more to the point, the use of the word "works" can connote past and present works. There is a temporal aspect to the use of the word "works", which includes the present. It would be strange indeed that the offence provision could not capture damage to works currently under construction or is limited to established infrastructure.

[66] More importantly, I turn now to consider the evidence about the incident at hand. As I said earlier, much of the evidence that I have received is not direct evidence. It is second-hand. The best evidence to reiterate is the evidence of Mr Connor Raimoana who, on 31 January 2024, was driving in an open lane which should have been closed to oncoming traffic. He encountered a car which drove at him, causing him to take evasive action and causing both a Fulton Hogan driver following behind him and two or three other cars behind him to take evasive action.

[67] Direct evidence also comes in the form of Mr Neal Vanner, who encountered somebody blocking an open lane.

[68] If the McLeod dashcam footage was taken on the dates between 28 January to 2 February, that is relevant evidence, as well, because it shows a vehicle knocking over

six of the cones in a deliberate fashion. The question mark I have over that, however, is the date stamp on the footage does not line up with the time period that is before me.

[69] That is the direct evidence. There is, of course, some secondary evidence of complaints being made about people ignoring traffic management signs and signals, et cetera.

[70] Such incidents did not destroy or damage the works, but they did obstruct or interfere with the works. That ultimately led to a decision to stop work on or about 2 February. The question from me is: are the nature and quality of those incidents sufficient to grant the injunction?

[71] RLC rely on the January incidents to point to the climate at the worksite at the time. They say – and I am not attempting to second-guess their decision at all – that they were sufficiently concerned about those incidents to stop work in order to safeguard their contractors' safety and equipment. If injunction proceedings had been filed shortly thereafter, it is probable that an injunction would have been granted.

[72] Having said that, the injunction application that is before me is premised on the basis of a concern that unless it is in place, there will be further and future similar – or perhaps even more serious – incidents. That sentiment is encapsulated in the evidence of Mr Michael, who says at paragraph 65 of his evidence:

> I believe there is a high risk of ongoing interference with the works.

[73] That position is also reflected in the submissions of RLC who, at paragraph 33 of the written submissions, say:

> RLC's position is that these past incidents, and potential future incidents, will stop, obstruct or interfere with the wastewater works and associated traffic management measures, in breach of section 232 of the LGA.

[74] In essence, what is sought here is an injunction to restrain future behaviour, not necessarily past behaviour, or present behaviour, but future behaviour. That type of injunction is perhaps similar to a Quia Timet injunction.

[75] Nobody can predict the future. Nobody knows the likelihood of or possibility of future interference with the works. As to what are the predictors of future behaviour, of course, there is nothing currently happening of concern. RLC would meet that by saying, the reason for that is there are no works taking place in the area.

[76] What is being totally relied on is what happened in January of this year, some six and a half months ago. As time passes, the strength of the linkage between those events and future behaviour may weaken. I am very conscious that there is no need to prove continuous offending. That is what the commentary, at least in Westlaw, says, and there of course has been the removal of that requirement from the legislation.

[77] Section 162 of the LGA talks about restraining a person from committing an offence. That provision is clearly aimed at preventing past and current behaviours. I think it also must include future behaviour. I say that noting that there are no legal authorities on point. However, if a territorial authority was to receive a credible threat or there is a set of circumstances which exist from which one could draw a probable conclusion that works properly vested in or under the control of a territorial authority were about to be destroyed, damaged, stopped, obstructed, or interfered with in some way, an injunction would be appropriate.

[78] There must be some caution in doing so, however. It requires an examination of the evidence relied on that is the nature and quality of the acts. Is there a temporal connection with the present? What is there before the Court that persuades the Court that there will be a future commission of an offence, and is that likely to occur?

[79] I note that in all of the cases that have been provided to me are examples of injunction orders having been made, when there was an ongoing breach of a bylaw, either by:

(a) Occupation of a public space,[8]

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[8] *Auckland City Council v Occupiers of Aotea Square*, Auckland Central DC AK CIV-2001-404-002492 [21 December 2011].

(b) Occupation of a public road, preventing access to the public to using the road and the unlawful erection of structures,[9]

(c) Occupation of a road, the locking of a gate and preventing access to it.[10]

[80] The decision of Judge Wilson QC in the *Auckland City Council v Occupiers of Aotea Square* decision was appealed before the High Court.[11] In that case, the Judge was Ellis J. Justice Ellis ultimately upheld an appeal in that case and narrowed the scope of the injunction. Her Honour narrowed that part of the injunction which restrained future breaches by the protestors of a bylaw. I infer one of the reasons she did so because, by the time the matter had reached her, the occupiers of Aotea Square had vacated it. Her Honour was concerned that the injunction should reflect only what was needed.

[81] On this question, however, of future action, Ellis J said as follows:

> [81] In the present case, the terms of the orders sought and granted restrained the protestors from "committing breaches of" the relevant clauses in the Bylaw. On its face, therefore, the order restrains not only the existing breach, namely the Occupy protest, but also any future breach by any of the protestors of any of those clauses. Thus a protestor who later (for example) used a loudspeaker or put up a poster in Aotea Square without a permit would not only be breaching Bylaw 20 but would also arguably be in contempt of the Court's earlier orders.

[82] Justice Ellis then went on to compare the terms of s 162 with its statutory predecessor, namely, the Local Government Act 1974 s 698(3).

[83] Her Honour went on, at paragraph 83, to say as follows:

> [83] This narrower focus on stopping the *continuation* of an existing breach is in my view appropriate, particularly where NZBORA rights are at issue. All that was required to achieve the purpose of the Bylaw was an order that required the then-existing occupation of Aotea Square to cease. A much wider order is not necessary to achieve that end and, moreover, potentially has a chilling effect on the protestors' future exercise of their rights to associate, assemble, and freely express themselves. In my view, therefore, the injunction as sought and granted cannot be said to meet the minimal impairment standard

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9 *DC Thames Coromandel District Council v Frances Henare & Ors*, DC Thames CIV-2010-075-000176 [20 October 2010].

10 *Tauranga City Council v Faulkner* [2016] NZHC 1440.

11 *Wadsworth v Auckland City Council* [2013] NZHC 413.

> and thus does not constitute a justified limit in the *Oakes* terms. (Footnotes omitted)

[84] In the only other High Court authority I am aware of is the decision of *Stanton v Heke*. That case involved a person who would, on a semi-regular basis, park his cart in the central area of the Nelson City. He would park in either metered parking spaces or spaces where there was a finite time limit imposed by the council. He had an aversion to paying parking fees. Various measures were taken against him, including the seeking of an injunction, which was granted by His Honour Judge Tompkins in the District Court pursuant to s 162 of the LGA. An appeal against that decision was upheld for several reasons which Goddard J has set out starting at paragraphs 19 through to 24.

[85] One of the issues which led to her Honour upholding the appeal was the nature of the breach of breaches sought to be restrained. She discussed this at paragraph 21 of her decision:

> [21] Second, the nature of the breach or breaches sought to be restrained is itself problematic. It concerns future events that have yet to occur, each of which involves a separate, unrelated act. While any distinction between a one-off offence and a continuing breach has been removed in s 162, and there is force in Mr Ironside's argument that the repetitive nature of Mr Stanton's infringements could be regarded as a continuing course of conduct, the type of breach or offence to which s 162 is directed does not readily lend itself to the conduct targeted in this case. Rather, in terms of the case law, the type of activity contemplated is an ongoing breach or nuisance, such as the erection of structures or the discharge of a substance from a property, or some similar type of breach of a scale that merits the additional measure of injunctive relief in addition to other proceedings, such as prosecution. (Footnotes omitted)

[86] Therefore, there are two High Court decisions before me in which both High Court Judges were aware that there is no need to prove that there is an ongoing or continuing offence. In both cases, the High Court Judges were concerned about the scope of injunctions issued by the District Court restraining future events.

[87] Those words of caution are important in considering the nature of the injunction sought in this case, which seeks to restrain future actions. I reiterate I accept in principle that an injunction restraining future actions is, of course, possible, but it must be read subject to those words of caution I have outlined.

[88] As I said, I accept that the incidents complained of at the time in January 2024, that is, the incidents of direct evidence that I have received, would have been sufficient to warrant an injunction if brought before me closer on time to the incidents occurring.

[89] We are now some time down the track – some six and a half months. There is currently no ongoing concerning behaviour. Does that warrant the granting of an injunction now?

[90] I am of the view that the risk of the future commission of offences against s 232 does not exist. At this stage, I am not persuaded on the balance of probabilities that such a risk exists. At best, it is an informed guess. I could, of course, be proved wrong, and that remains to be seen. But a cautious approach is warranted in this case, as there are rights of ownership, rights protected under the New Zealand Bill of Rights Act, and tikanga rights and obligations at play, as well.

Result

[91] I am not going to grant an injunction restraining future behaviours at this stage, but nor am I going to dismiss the application. I am going to adjourn it sine die, with leave granted to RLC to renew it if needed.

[92] In saying that, I am going to express some words of caution to the Board of Control, its supporters, and anyone else, for that matter. The decision not to grant the injunction does not stop Tarawera wastewater reticulation scheme from continuing. The scheme remains in place. RLC and its contractors are entitled to continue with the works. Any thought that this decision has stopped the works is wrong. This Court cannot make that decision. The only Court that could be the High Court in a different type of proceedings.

[93] Peaceful protest against the pipeline is, of course, permissible. But actions taken to destroy, to damage, to stop, to obstruct or to interfere with the works will undoubtedly be met with future legal action. Similar actions to that seen in January – the blocking of a road, driving at cones, driving at workers' cars and others in an

enclosed lane – are likely to lead to a renewal of the injunction proceeding as an example. In addition, that could lead to police prosecution involvement.

[94] The Board of Control have said that they are committed to peaceful, lawful protest, but they cannot control the individual actions of all its members or, indeed, outsiders. I accept that. But it would take only the foolish actions of a few – possibly even one – to result in future and further legal action. If, for example, the injunction application had to be revived, that would undoubtedly involve the Board of Control. That would involve legal costs and attendances, and it could mean the imposition of an injunction on even more possibly restrictive terms than is currently sought.

[95] I say this not as a threat to anyone, but as an outline of what could realistically happen if somebody takes it into their mind that if the works commence, they can interfere or attempt to stop the works. The works can continue, as I have said.

Decision

[96] The application is adjourned sine die. There is leave granted to the RLC to renew the application at any time. I make a direction that any renewal of the injunction application should, as a matter of urgency, be directed back to me for obvious reasons, given that I am now seized of the background.

[97] Given that the application is adjourned, I do not think it is appropriate at this stage to consider the question of costs.

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Judge SR Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/07/2024