

IN THE DISTRICT COURT  
AT ROTORUA

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

CIV-2024-063-000364  
[2024] NZDC 24369

BETWEEN

ROTORUA DISTRICT COUNCIL  
Applicant

AND

ROKŌKĀKAHI BOARD OF CONTROL  
Respondent

Hearing: 8 October 2024

Appearances: K Cornege and C Gordon for the Applicant  
S Northey and A Grant for the Respondent

Judgment: 9 October 2024

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ORAL JUDGMENT OF JUDGE S R CLARK

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**Introduction**

[1] The Rotorua District Council, operating as the Rotorua Lakes Council (RLC) have developed and partially constructed a wastewater reticulation scheme (“the scheme”), for the Lake Tarawera community.<sup>1</sup>

[2] The scheme envisages the collection and diversion of wastewater from approximately 440 properties in the Lake Tarawera catchment area to an existing pumpstation at Ōkāreka. The wastewater would then be diverted via a pipeline to a wastewater treatment plant in Rotorua.

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<sup>1</sup> Known as the Tarawera Wastewater Reticulation Scheme.

[3] Part of the scheme involves the laying of a wastewater pipeline underneath the formed portion of a section Tarawera Road which runs parallel to part of the northern bank of Lake Rotokākahi.

[4] Work on the Tarawera Road section of the scheme started in late January this year. At the time, there were people in the general vicinity opposing the infrastructure works. At the time there were several incidents which sufficiently concerned RLC and their contractors that they ceased work on 2 February 2024. Subsequently on 16 May 2024, RLC filed injunction proceedings, pursuant to s 162 of the Local Government Act 2002, seeking to prevent interference with the pipeline works.

[5] On 16 July this year, I heard that injunction application. The Lake Rotokākahi Board of Control (hereafter referred to as the BoC) took the position of first respondents.

[6] After reviewing the evidence, I ultimately did not grant an injunction at that stage. I did, however, grant leave to RLC to renew the injunction application if they deemed it necessary.<sup>2</sup>

[7] On 1 October, RLC filed a renewed application for an injunction on an ex parte basis. They cited in support an attempt to restart the works on 26 August 2024 and various incidents which has prevented that from happening.

[8] I arranged for an urgent telephone conference, which was attended by counsel acting for RLC and the BoC, on 2 October. I was not prepared to proceed on an ex parte basis, for the reasons set out in a minute issued that day. In summary, they being that there has been widespread public interest in the application in the Rotorua area, and that the first hearing had already been on notice. For those reasons, I indicated that this hearing would also be on notice.

[9] However, in recognition of some urgency of the matter, I set out a truncated timetable for the filing of affidavits and submissions in response by the BoC, the date for that being 7 October 2024. A hearing took place yesterday – 8 October – which

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<sup>2</sup> *Rotorua District Council v Rotokakahi Board of Control* [2024] NZDC 16999 [17 July 2024].

occupied most of the day. At the end of the day, I took a view of the site by driving that portion of Tarawera Road which is the subject of the application.

[10] In my earlier decision, I set out a full description of the background to the scheme, the inception of the BoC, the ownership and importance of Lake Rotokākahi, the proposed works, and the January 2024 incidents. I set that out at paragraphs [1] through to [43] inclusive. The matters I covered are relevant to this decision and I adopt that background.

[11] This decision is an oral decision. I reserve to myself the right to make any amendments to it, but they will be restricted to spelling, citation, grammar, or unfortunate or clumsy expression.

[12] I do regret that it is an oral decision. The issues raised are of some significance and not the everyday civil work of the District Court. They involve an important public infrastructure scheme which it is hoped will lessen the degradation of the waters of Lake Tarawera. The case also involves Lake Rotokākahi which is Māori ownership and is tapu. The case involves tikanga and treaty issues. All of that warrants time being set aside to consider and reflect on the issues in depth.

[13] I regret to say that there is simply no allowance in the District Court roster to take the necessary time to reflect, either on this occasion or indeed when I heard the first hearing to reserve my decision. Even to deliver this decision orally today involves the rearranging and rescheduling of the work of no fewer than four District Court judges, not including myself.

### **Recent facts**

[14] Between 6 and 14 August 2024, RLC and its head contractor, Fulton Hogan, met with the New Zealand Police to discuss my earlier judgment to plan recommencing the works.

[15] In the week of 19 August 2024, several measures were undertaken by RLC and their head contractor Fulton Hogan, in anticipation of recommencing the works. Examples being the provision of body cameras to traffic management workers, the

installation of fixed CCTV cameras, the installation of screened security fencing, and the employment of security guards.

[16] The works were slated to start again on 26 August 2024. It became apparent that a hikoi was planned for and, indeed, took place on that day. Recommencement was postponed until later that day, after the hikoi had taken place.

[17] It is important to record that RLC do not rely on the hikoi as a ground for the injunction. It is accepted by all that the hikoi was peaceful, and no complaint is made in relation to that, nor having seen some video footage of it, could there be.

[18] Work recommenced on the evening of 26 August. It was intended that some digging would take place. Between 7 pm to 10 pm that evening, several incidents took place. I turn to outline some of those incidents which are recorded in an affidavit of Mr Baden Neylon dated 18 September 2024. I summarise them as follows:

- (a) An employee of Universal Underground Limited (UUL), who are contractors to Fulton Hogan was operating a digger onsite. Persons began shining torches and spotlights into the operator's eyes.
- (b) At around 7.30 pm a group of approximately 10 persons breached the security fence surrounding the worksite and began to interfere with spotlights used to illuminate the work area. One person pulled out plugs and hit the spotlight's kill switches.
- (c) Persons outside the worksite began to lean on and kick over security fences.
- (d) About 9 pm, between 10 to 15 persons breached the worksite area and demanded to speak with whomever was in charge. A statement was made that the UUL workers were "trespassing".

[19] Mr Neylon goes on to say that security staff at that stage became outnumbered. He deposes that he heard a person referred to "*grabbing his shotgun and blasting them*". He went on to depose that he heard various threats of violence. He also said

he observed persons intentionally standing in the way of UUL vehicles attempting to complete the drilling operation.<sup>3</sup>

[20] On 27 August 2024, Mr Ross Dallaway, who is a project manager at Fulton Hogan, arrived onsite. He deposed that as he was walking along the worksite, when two men who were not employers of Fulton Hogan or any other subcontractors, breached the security fencing area and approached him. Those persons, he noted, were captured on CCTV footage.<sup>4</sup>

[21] Mr Dallaway goes on to talk about another man approaching him, albeit in the live traffic lane, shouting at him and accusing him of trespassing.

[22] On the following day, Mr Dallaway again visited the site. He says that whilst doing so, persons rushed at the security fence and were shouting and angry. He said that also happened when he returned at approximately 3 pm. He went on to say that he was unable to conduct his role as the project manager.

[23] Mr Dallaway deposes at paragraph [28] of his affidavit that several persons parked their vehicles on the lake side of Tarawera Road, around the entrance to the Lake Rotokākahi boat ramp, in among traffic cones and signs which are intended to indicate no parking areas.<sup>5</sup>

[24] Since the last hearing, several temporary structures have been erected in the area adjacent to the lake access area (also referred to as the jetty area), and immediately opposite that area on the landward side of Tarawera Road. Photographs of those structures can be seen in exhibit A to the affidavit of Ross Dallaway, and in video footage, which is captured and provided as part of the evidence of Mr Skipwith for the BoC.

[25] I record that there are several incident reports attached to the affidavit of Mr Dallaway. Some are in his name; some are recorded in Mr Neylon's name. I note that

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<sup>3</sup> Affidavit of Baden Neylon dated 18.9.24, at paragraphs [7]-[14] inclusive.

<sup>4</sup> Affidavit of Ross Dallaway dated 24.9.24, exhibit B, labelled 001.

<sup>5</sup> Affidavit of Ross Dallaway dated 24.9.24, at paragraphs [14], [18], [19],[20]-[28] inclusive.

there are also some from other contractors, which are hearsay and I do not rely on them.

[26] Returning to the chronology of recent events, on 28 August 2024, Mr Lee for the Board of Control, enquired of RLC about the appointment process of a cultural monitor and nominated a person on that day.

[27] On 29 August 2024, there were meetings among RLC, Fulton Hogan, and police representatives and work was halted.

[28] On 2 September, a “trespass notice” was issued by the Tūhourangi Tribal Authority referring to work in the Te Wairoa Stream. I do not have a copy of that “trespass notice” before me.

[29] Between 4 and 19 September 2024, discussions took place among representatives of the BoC, the Te Arawa Lakes Trust, and the Tūhourangi Tribal Authority.

[30] There was also a series of emails exchanged between 16 and 18 September 2024, to which I will refer. Those emails are attached as exhibits to the affidavit of Mr Stavros Michael, dated 8 October 2024.

[31] I start with an email of 16 September 2024 sent at 5.51 pm by the CEO of RLC to, I am assuming, representatives of the BoC. That email reflects that there had been discussions taking prior to 16 September. It also reflects that Mr Lee, on behalf of the BoC, had requested background information.

[32] On 17 September 2024, Mr Lee sent an email to the CEO recording that there was going to be a hui between the governance boards of the BoC, the Tūhourangi Tribal Authority, and the Te Arawa Lakes Trust. He mentioned previous requests for information. He also indicated that an invitation to speak directly with the council members of RLC might be taken up.

[33] On 18 September 2024, the CEO of RLC sent Mr Lee an email. That included a response to Mr Lee’s email of the previous day. The CEO mentioned that he would

be briefing councillors later that day and that it would be a good time to understand what the BoC position was. Mr Lee responded later that day at 11.32 am. He indicated that the:

Rotokakahi Board of Control position has never changed. It has been well-documented through a number of hui, that the Tarawera pipeline is not to pass through Rotokakahi whenua and catchment.(sic).<sup>6</sup>

[34] Later that day at 5.25 pm, the CEO again sent Mr Lee and representatives of the Te Arawa Lakes Trust and the Tūhourangi Tribal Authority an email. It appears at Mr Michael's affidavit as an exhibit at 2SM-B. The CEO indicated that the council had authorised him to continue speaking with iwi leaders:

...in order to try and mitigate risks to all people at either site and to continue with operational tasks as required.

To be clear, council has not stopped the project, nor given me any new direction on alternatives to this project.<sup>7</sup>

[35] On 19 September 2024, there was a hui among the trustees of the BoC, the Te Arawa Lakes Trust, and the Tūhourangi Tribal Authority. Following that, a follow-up hui with RLC was sought.

[36] A hui did take place on 24 September, about which I heard quite a lot of submissions. In attendance were representatives from the Board of Control, the Te Arawa Lakes Trust, the Tūhourangi Tribal Authority and RLC. There is disagreement before me as to whether that meeting was confidential, whether it was held on a without prejudice basis, about the role that Mr Te Ururoa Flavell played, and about the outcomes. I will return to that later. I record that I have not been provided with a copy of any minutes of the meeting. I do not even know if any minutes were kept.

[37] What appears to be understood by all is that there would be a further meeting among the three respective iwi groups and their members. For RLC, Mr Michael at paragraph [11] of his affidavit, whilst disagreeing with the characterisation of the meeting, appears to concede that possibility.

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<sup>6</sup> Affidavit of Stavros Michael dated 8.9.24, exhibit 2SM-A.

<sup>7</sup> Affidavit of Stavros Michael dated 8.9.24, exhibit 2SM-B.

[38] On 1 October 2024, the CEO sent an email to the BoC, advising that RLC would proceed to file an injunction.<sup>8</sup> Later that afternoon, RLC filed their renewed injunction application on an ex parte basis, albeit the solicitor acting for the Board of Control was also notified at the same time.

### **RLC position**

[39] The RLC position is that the contemplated works are lawful, that they are aware of the concerns of the BoC and that BoC's concerns have been heard are understood, and that they have been consulted with.

[40] The RLC position is that an attempt to start the infrastructure work has been undertaken now on two occasions and they have been paused – first on 2 February 2024 and, most recently, on 28 August 2024, due to the actions of those opposed to the works. Their concern is that if the works are started again, it is inevitable that there would be ongoing interference.

[41] From their perspective, any ongoing BoC engagement is about finding alternatives to the current intended pathway of the pipeline and that the BoC's ultimate objective is to stop the works. RLC say they are open to discussion about how protest action is redefined to allow the works to continue.

[42] RLC say that at the meeting, which took place on 24 September 2024, that their intentions to continue with the scheme were discussed and outlined, that they were willing to listen to suggestions to mitigate risk and, at the same time, allow protest that did not interfere with the works, but they made no commitment to a discussion about alternative routes for the pipeline. RLC say that notwithstanding the email from their CEO on 1 October 2024, they are still open to a discussion on mitigation measures.

[43] RLC acknowledge that the scope of the injunction now sought is significantly broader than that originally sought. They say that is in response to the fact that the BoC cannot and does not purport to act for all individuals who are opposed to the works, and that recent events – by that I mean what happened on 26-28 August,

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<sup>8</sup> Affidavit of Mr Wally Lee dated 7.10.24, exhibit A.



together with police advice mean that the scope of the injunction needs to be significantly broadened.

[44] RLC oppose any suggestion of an adjournment. They say that there have been considerable delays to date, that there is a cost to them, a cost to the community, and to the Tarawera ratepayers. They say that if a request for an adjournment is granted that the works are not likely to be recommenced until mid-November this year. They are also concerned that any delays to engage with BoC might be used against them in future proceedings. They say a lot of infrastructure is already in place and is potentially at risk. They do not expect any change and no narrowing of the gap between the parties. Their expectation is that the works can be completed within four weeks.

### **Board of Control position**

[45] I set out the background to the ownership arrangements and inception of the BoC in my earlier decision at paragraphs [8] to [16] inclusive, I adopt that discussion. To reiterate, the bed of Lake Rotokākahi and its constituent lands are Māori freehold land and the control and management of the lake, and those lands are vested in the Lake Rotokākahi Board of Control.

[46] The BoC have, as their legal responsibilities, the control and management of the lake. In that capacity, they appear as representatives and spokespersons for the owners of the lake. I also accept that they represent the mana whenua of the area, namely, Tūhourangi and Ngāti Tumatawera.

[47] I have previously acknowledged – and do so again – that it is not in contest that Lake Rotokākahi is tapu. The public do not have access to its waters, islands, and environs: only the owners may do so. It is considered a wāhi tapu and is of high historic and cultural significance to the peoples of Tūhourangi and Ngāti Tumatawera.

[48] The BoC oppose the pipeline passing through lands adjacent to the lake. They also oppose any injunction, which they say would restrict their rights of access to the lake and interfere with the discharge of their kaitiaki responsibilities. As the owners and kaitiaki of the lake, the BoC have responsibilities to safeguard the lake, which

encompasses safeguarding the mauri or life essence of the lake and its physical and spiritual health in accordance with their tikanga.

[49] At a broad level, BoC oppose the pipeline running through those lands adjacent to the lake. They say that the decision-making undertaken by RLC to reach that decision was flawed and wrong. In relation to the narrower issue of the injunction, they say they are opposed to it and, as I have said, their view is it would result in an unjustified limitation on them and their members, to peacefully assemble in opposition, and would limit rights of access to the lake.

[50] Their fundamental position is that the pipeline should not pass through land adjacent to the Lake Rotokākahi catchment area. That position is most recently expressed in the email by Mr Lee I have set out earlier.

[51] As a new issue the BoC raise a concern that the ownership of the Tarawera Road reserve corridor is not as clear-cut as previously thought. They cite the evidence of Mr Lee on this point and surveying recently undertaken by RLC. The submission, in short, is that the council – RLC – must be in a position to unequivocally prove that the road reserve corridor is owned by them. In addition, BoC refer to provisions of the Local Government Act 2002, which require RLC to take into account Treaty obligations and to involve Māori in their decision-making process.

[52] Ms Northey for the BoC referred to the hui of 24 September 2024. She noted those who were in attendance, describing them as Rangatira, which I do not quibble with, and that the groups present represent acknowledged tribal authorities. More to the point, that her clients – the Board of Control – thought that a tikanga process was being worked through. BoC’s position is that their understanding of the outcome of the hui of 24 September was that a working party would be formed to explore options, including possible mitigation options, and that there was no mention of any injunction being recommenced at that stage.

[53] Concern was expressed in submissions made yesterday that the RLC had acted disingenuously. They cite as an example that on 18 September 2024 the CEO of RLC invited discussions purporting to “continue working in good faith”, when at the same

time deponents for RLC were finalising affidavits in support of an injunction application.<sup>9</sup> She cites the affidavits of Mr Neylon affirmed on 18 September and the affidavit of Mr Dallaway affirmed on 24 September 2024 as examples of that.

[54] In short, the BoC, Ms Northey says, thought they had a way forward and she refers to a hui-ā-iwi tentatively proposed for Sunday 13 October 2024. In response to questions to her yesterday, she indicated that the position of the BoC is that they would consider mitigation steps if that were the direction given to them at a hui-ā-iwi.

[55] In addition, the BoC note the extended scope of their renewed injunction application. They are concerned that, if granted, it would prevent access to their lands, streams, and lake. It would prevent access to the jetty area, all of which is an unreasonable and unjustified limitation on them. A submission was made that alternative access at Waipa Road is some distance away, is inaccessible and practically difficult. The BoC say that the injunction as proposed provides no assurances as to how they – that is, the BoC – as the legal owners of the lake can access it. In essence, the submission is made that the current injunction is an overreach.

### **Legal framework**

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

**162 Injunctions restraining commission of offences and breaches of bylaws.**

- (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

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<sup>9</sup> Affidavit of Stavros Michael dated 8.9.24, exhibit 2SM-A.

(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 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).

[57] Section 162 of the Local Government Act 2002 differs from the corresponding provisions in previous legislation such as ss 683(2) and 698 of the Local Government Act 1974, s 173 A of the Town and Country Planning Act 1977, and s 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.

[58] At paragraphs [77] to [87] inclusive of my previous decision, I discussed the scope of s 162, and the fact that there is no necessity to prove that an offence or breach of any bylaw is a continuing offence. I adopt that discussion.

[59] I also discussed whether s 162 captures any future anticipated offence or breach of any bylaw. I accepted at paragraphs [77] and [87] that, in principle, an injunction restraining future actions is possible. Having said that, I noted the caveats applied to the scope of injunctions in respect of anticipated breaches in two High Court cases.<sup>10</sup>

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<sup>10</sup> *Wadsworth v Auckland City Council* [2013] NZHC 413; *Stanton v Nelson City Council* [2014] NZHC 3117. I note that I might have incorrectly referred to that case as “*Stanton v Heke*” in my previous decision.

[60] The onus of proof for an injunction of this type 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.<sup>11</sup>

[61] Therefore, in order for RLC to succeed, I must be satisfied on that 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 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
- (c) That an injunction is required to restrain any person or persons from committing one or both of those types of offences.

## **Discussion**

[62] The factual situation I now have before me is different from when I last heard the matter in July 2024. I now have before me uncontested evidence that structures have been erected in two places along Tarawera Road within the road reserve. Those structures have been erected at the lake access point/jetty area. There are photographs and videos which indicate that a semi-permanent encampment has been established in that area. Immediately opposite that area are two structures overlooking the works which appear to be less permanent, possibly made up of pallets being stacked on top of each other, covered by a blue tarpaulin. I record that I am not referring to those structures built on Department of Conservation lands.<sup>12</sup>

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<sup>11</sup> *O'Sullivan v Mount Albert Borough Council* [1968] NZLR 1099; *Taranaki City Council and Hammond* [1988] DCR 109; *Stanton v Nelson City Council* [2014] NZHC 3117 at [18]

<sup>12</sup> Photographs evidencing that can be seen in the second page of exhibit A to the affidavit of Mr Mostert dated 30 September 2024. They can also be viewed in the videos which are exhibits C and H contained in the USB stick filed in support of Mr Skipwith's affidavit.

[63] Associated with the semi-permanent encampment are several cars and vans parked on the side of Tarawera Road within the road reserve and contrary to traffic management measures attempted by RLC. The section of Tarawera Road in question is restricted to one “live lane” controlled by traffic lights at each end. The other lane is fenced off and it is intended that the infrastructure works are carried out within that lane. The presence of the cars and vans in areas designated as no parking areas is a safety issue to all concerned, those alighting from the cars, those driving along Tarawera Road and people working in the vicinity.

[64] I refer to the chronology of events I set out earlier in particular, to events of 26 and 28 August 2024. To reiterate, I am not referring to the hikoi. As I said, there is no issue taken with that. What I am referring to is those persons who accessed the worksite, prevented digging and drilling, interfered with the security fencing, and made threats to contractors present, so much so that a decision was made that the works must be postponed.

[65] I am satisfied on the balance of probabilities that:

- (a) The Tarawera Wastewater Reticulation Scheme is under the control of RLC. It is also taking place on land vested in it, namely, the Tarawera Road Reserve. I will return to that issue, though.
- (b) The nature of the reticulation works to be carried out falls within the definition at s 232(1)(e) of the Local Government Act 2002, which is a catch-all provision. That provision provides that any type of works not specifically referred to in the preceding paragraphs (a) through to (d) are captured by that sub-section.
- (c) That between 26 and 28 August 2024, persons unknown offended against s 232(2) of the Local Government Act 2002 by wilfully stopping, obstructing, or interfering with any works vested in or under the control of RLC.

[66] Although not relied upon in the application, I am of the tentative view that the structures erected along the Tarawera Road Reserve are more likely than not to constitute an offence or probably more likely to be in breach of an RLC bylaw. As can be seen in my later comments I require more information on that issue.

[67] Therefore, I am of the view that an injunction should issue unless special circumstances apply, or the issue should be delayed in the interests of justice.

### **Special circumstances/interests of justice?**

#### ***Adjournment***

[68] The BoC have sought an adjournment of the hearing for a four-week period to allow the completion of a “tikanga process”. They say that following the meeting of 24 September 2024 a further hui was intended to be held. They say that all concerned knew about that, including RLC. On-going discussion was contemplated, which would include opposition to the pipeline and potential mitigation steps. BoC say they were blindsided by the email of 1 October 2024 from the CEO of RLC, indicating that the injunction proceedings would resume. The BoC say that the fact that RLC were preparing affidavits for a hearing at the same time when referring to ongoing discussions goes to lack of good faith on their part.

[69] I have considered this issue carefully, along with that associated email chain which I referred to earlier attached to the affidavit of Mr Michael dated 8 October 2024. It is clear there were different understandings of what took place at that hui. If I thought that the evidence was such that RLC had in some way misled, misinformed or knowingly allowed the Board of Control and others to misunderstand the nature of what RLC expressed at the 24 September 2024 hui, that not only would the adjournment be granted, but the grounds for an injunction would be seriously weakened.

[70] I return briefly to those emails. Mr Lee, as the representative and spokesperson for the Board of Control, in his email of 18 September, made it clear what the Board of Control position was.

[71] Having said that, the CEO of RLC in his email of 5.25pm on 18 September clearly stated that from the RLC perspective, ongoing discussions would be limited to mitigation of risks to all persons at or near the site not about any new directions of alternative options.

[72] Mr Lee's understanding of the outcomes of the 24 September 2024 hui is at odds with Mr Michael from RLC, who also attended the same meeting. Mr Michael deposed that the CEO communicated at the meeting that the scheme would continue, that any wider meeting with iwi members was to be arranged urgently, and that the range of solutions to be discussed did not include alternatives.<sup>13</sup>

[73] Clearly, there are different understandings. I cannot resolve that. The parties are at cross-purposes in their understanding. There does not appear to have been mention at the 24 September hui of any resumption of the injunction. It also seems to be acknowledged, as I have said earlier, that there would be a further hui-ā-iwi.

[74] Where does this take us? I have considered this against several provisions of the Local Government Act 2002, which reference Treaty principles and the inclusion of Māori in local government decision-making. Section 4 of that Act is a Treaty clause, which provides that it is the Crown's responsibility to maintain and improve opportunities for Māori to contribute to local government decision-making processes.

[75] Section 14(1)(d) of that Act provides that when performing its role, a local authority must provide opportunities for Māori to contribute to its decision-making process.

[76] Section 81(1)(a) provides that a local authority must establish and maintain processes to provide opportunities for Māori to contribute to the decision-making process of the local authority.

[77] Section 82(2) provides that a local authority must ensure that it has in place processes for consulting with Māori.

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<sup>13</sup> Affidavit of Stavros Michael dated 8.9.24, at paragraph [8].



[78] The Treaty principle of partnership requires parties to act reasonably, honourably, and with the utmost good faith.<sup>14</sup> Inherent in the obligation to act in good faith is an obligation on the Crown and – in this case, RLC – to be sufficiently informed in its decision-making. There is an obligation to consult on truly major issues.<sup>15</sup>

[79] As stated earlier the BoC's fundamental position, which is that they oppose the pipeline running through lands adjacent to the lake. They say that the decision-making process, which included a consultation process, was flawed and wrong.

[80] I have said previously and do so again, that this Court does not have the jurisdiction, that is, ability to enquire into the decision-making process of the council to proceed with the scheme, which includes any consultation undertaken about whether the scheme should have started and the path the pipeline would follow. The Court that has the jurisdiction to consider those sorts of issues is the High Court in judicial review proceedings. Therefore, questions of the adequacy or otherwise of the consultation process leading up to the decision by RLC to proceed with the scheme and choose the pathway for the pipeline cannot be reviewed by me or this Court.

[81] Therefore, there would be little point in adjourning the proceedings to investigate alternative options. Really, the question is whether there should be an adjournment to enable consideration of mitigation steps if the works were to resume.

[82] When questioned by me, Ms Northey submitted that there is always a possibility if that is what the BoC were directed to do by its members then they would do so. She made the submission that the BoC do not have the authority to consider such steps on their own, and that they must first gauge the views of the iwi. As I said to her yesterday, that is, strictly speaking, not the correct legal position, but I fully understand the cultural imperative that the BoC would not make such a decision unless they had first gauged the views of their members and received a mandate to do so.

[83] I have decided not to adjourn the proceedings. Why? The BoC have a firm position: the pipeline should not proceed over lands adjacent to the lake of which they

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<sup>14</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

<sup>15</sup> *New Zealand Maori Council v Attorney-General* [1989] 1 NZLR 142 (CA).

are the mana whenua. If anything, their views, and those that support them have, in recent times, firmed. That is evidenced by the now occupation of two sites.

[84] In addition, I note that the injunction was first sought on 17 May this year, nearly five months ago. I note that the first hearing took place on 16 July, nearly three months ago. I have not sighted, seen, or heard of any suggested by BoC which suggests any mitigation measures to enable the recommencement of the works. I suspect that – and this is not a criticism – the complete focus of the BoC has been to oppose and prevent the pipeline works from recommencing rather than mitigate. Had there been some indication before me of a willingness to entertain mitigation steps that might have persuaded me to adjourn the proceedings.

[85] Whilst I do not agree to an adjournment of the proceedings per se, I recognise the mana of three iwi groups that were involved in those discussions, their status, and those that represent them. I will allow the possibility, perhaps slim, that acceptable mitigation steps might be identified and agreed to by RLC and the BoC following a hui-ā-iwi, and that will be reflected shortly in what I am about to say.

### ***The ownership of the roadway***

[86] Before I move on to that, the injunction is premised first on the basis that the works carried out would take place underneath the formed part of Tarawera Road. Second that Tarawera Road lies within a road reserve corridor that is vested in RLC. That is a matter which I raised with the lawyers for both RLC and the BoC in a telephone conference which took place prior to the first hearing.

[87] At the first hearing, BoC conceded that the road reserve corridor is vested in RLC, but they, along with Tūhourangi and Ngāti Tumatawera, maintained mana whenua status over those lands.

[88] In the affidavit filed recently by Mr Lee on 7 October 2024, he says that the position is not as clear-cut as originally thought. He cites a “Parcels map” sourced from Toitū Te Whenua (Land Information Data Service). He refers to that map and another map at paragraphs [25] and [31] of his affidavit.

[89] The maps show a parcel of land owned by the Board of Control, which is Lake Rotokākahi-parcel A. The Parcels map refers to parcel B, which is held by the Department of Conservation, and parcel C. I am not sure who the owners of parcel C are.

[90] It is Mr Lee's contention that the maps show that parcel C crosses over Tarawera Road. Therefore, the ownership of the road – at least in part, he says – is not as clear-cut as previously thought.

[91] I have before me the following documentation:

- (a) A survey plan, 11874, which is referred to in the first affidavit of Mr Mostert.<sup>16</sup> It is a survey plan dated 18 August 1899. It refers to the Rotorua-Wairoa Road in what is known as burnt sienna. The road runs along Lake Tikitapu and then alongside the northeastern part of Lake Rotokākahi. That was one of the maps relied on by RLC at the first hearing.
- (b) Yesterday in response to Mr Lee's affidavit, counsel for RLC sought – and I granted them leave – to file an affidavit by Ms Gavin, a registered legal executive employed by the solicitors acting for RLC. She attaches to her evidence a survey plan, 39932, which was sourced from Land Information New Zealand database, Landonline. The plan is dated May 1959. It shows a section of roadway at the northeastern end of parcel of land referred to earlier as parcel C. The roadway is, again, set out in burnt sienna. In small red writing immediately above that, there is reference to “Pub Rd under Native Lands Act 1886”. I do note that the path of the road appears to cross the Te Wairoa stream.
- (c) I have now two survey maps which show two separate sections of what is now known as Tarawera Road. It appears that I do not have a survey plan before me which shows that section of the Tarawera Road corridor,

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<sup>16</sup> Affidavit of Gerhardus Mostert, dated 11.7.24, exhibit GM.002. It also appears at the casebook at page 368.

which lies between the two areas depicted in the survey plans. There is, however, a Spatial plan before me sourced from Landonline.<sup>17</sup> The spatial plan shows the entire length of the subject area of the Tarawera Road reserve corridor running adjacent to Lake Rotokākahi.

[92] This is a matter which should have received greater attention by RLC and me at the earlier hearing. But the then position of BoC persuaded all, I think, not to examine it as closely as it was warranted.

[93] RLC rely on the definition of a road set out in s 315(1)(a) of the Local Government Act 1974, meaning inter alia:

The whole of any road which is in the district and which, immediately prior to the commencement of this part of the Act, was a road or street or public highway.

[94] RLC also rely on ss 317 and 318 of the same Act which provide for the vesting and control of such roads in themselves.

[95] Notwithstanding the concern raised by Mr Lee, it is in my view more likely than not that a public road has been set out and that the road reserve is vested in RLC and under their control. The evidence for that are the two survey maps and the spatial plan. Having said that, in the comments that follow, I will reflect the fact that I do not have a survey plan which covers that portion of the road that lies between those two sections of the road depicted on the survey plans before me now and what needs to be done about that.

### **Future actions**

[96] For the reasons set out earlier, I am satisfied that between 26 and 28 August 2024, persons unknown offended against s 232(2) of the Local Government Act 2002 by wilfully stopping, obstructing, or interfering with any works vested in or under the control of the RLC. That in and of itself warrants injunction orders being made. Such orders, however, will not be finalised until the following events have occurred.

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<sup>17</sup> Casebook at page 369.

[97] I direct that, no later than **4 pm Friday 18 October 2024** that:

- (a) RLC file and serve an affidavit attaching any further survey maps they can locate which demonstrate that the area of land between those areas depicted in survey plans 11874 and 39932 was, at some time, surveyed and set aside as a public road.
- (b) Counsel to file a joint memorandum setting out whether there is any agreement on the form of any injunction orders, appendix, and schedule to the injunction. This direction reflects the submission made by Ms Northey that, a hui-ā-iwi might take place this weekend and that there *may* be discussions about the form of any mitigation to be taken which allows the works to resume.
- (c) Such mitigation steps to include, if any, where and how the Board of Control and their supporters may maintain a presence in the lake access/ jetty area, that would allow them to continue to access the lake. To be clear I do not envisage the ongoing existence of the structures recently currently built in that area and across from the lake access/ jetty area.
- (d) Presupposing there is no agreement by the same date – Friday 18 October 2024 – counsel for RLC to file an updated memorandum outlining the form of any injunction that is sought, orders, appendix and schedule to the injunction. I direct that is also to be filed in Word format with the Court.
- (e) That memorandum is to refer to those sections, if any, of the Local Government Act 2002 or RLC bylaws which respond to the fact that several structures have recently been erected on the Tarawera Road Reserve corridor.

[98] As a guidance to RLC, my current thinking is that the scope of the injunction as currently sought is too broad. Referring first to Appendix 1: clause (b) is simply too draconian. That clause would prevent the trustees of BoC and their beneficiaries

from driving along Tarawera Road and visiting the lake access/jetty access area. That is an unreasonable restriction, particularly as they are the owners and kaitiaki of the lake.

[99] Appendix 1: clause (d), provides in its current form that no persons may park their vehicles in areas identified by signage and no parking areas as part of any traffic management plan. Whilst I do not disagree with the sentiment of that, I would urge RLC to consider ensuring that the form of any injunction permits the BoC to continue to allow access to the lake via the jetty area.

[100] Turning to Schedule 1. I refer to clause (2)(a). That refers to a section described as being from Mead Road to the Blue and Green Lakes lookout. The length of any section of the work zone needs to be considered and restricted to that, which is absolutely necessary. As an aside, I note that when travelling in that area yesterday, it appeared to be about 1.8 kilometres. The better description, I would have thought, of the work zone is to cover that area which is currently enclosed by the existing security fence line, or where the northern and southern traffic lights are located, if that is capable of easy expression.

[101] I refer to clauses (2)(a)(ii) and (iii) of Schedule 1. Those clauses, together with clause (b) of Appendix 1, have the effect of excluding all persons from accessing Tarawera Road, unless approved by RLC or their contractors. Again, that step is, in my opinion, draconian and unwarranted. Serious consideration should be given to a description encompassing the length of the site enclosed by the security fencing and a buffer zone, as was previously sought.

[102] I will be on leave at the time but, dependent on what is filed, I would be looking to finalise the form of any injunction orders during 21-23 October 2024. If nothing is filed on 18 October 2024, I will be unable to look again at this matter until 30 October, at the earliest.

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Judge SR Clark

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 14/10/2024