BEFORE THE INDEPENDENT COMMISSIONER

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a Notice of Requirement from the Palmerston North City Council for a designation of a new road connection between Abby Road and Johnstone Drive, Palmerston North

MEMORANDUM OF COUNSEL FOR THE REQUIRING AUTHORITY

Dated: 3 June 2020

CR Law
Cooper Rapley Lawyers

227-231 Broadway Avenue
PO Box 1945
Palmerston North
DX PP80001

Nicholas Jessen
06 353 5210
06 356 4345
njessen@crlaw.co.nz

MEMORANDUM OF COUNSEL FOR THE REQUIRING AUTHORITY

MAY IT PLEASE THE COMMISSIONER:

[1] The High Court has released its decision on the application for an interlocutory injunction made by a submitter in this process, Aokautere Land Holdings Ltd. A copy of the decision is **attached**.

[2] The Court rejected the application. Because of the decision, it is open to continue with the notice of requirement, bringing it to a hearing.

[3] Despite this, the requiring authority respectfully asks for a further two-week adjournment on any directions so that it may give further consideration to technical matters relevant to the requirement, including consideration of matters that have arisen out of informal prehearing discussions between the reporting officers and the requiring authority.

[4] Counsel respectfully seeks a further reporting date of 12 June 2020.

DATED 3 June 2020

Nicholas Jessen

Counsel for Palmerston North City Council

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE PAPAIOEA ROHE

CIV-2020-454-24
[2020] NZHC 1110

IN THE MATTER OF	an application for interim injunction as associated relief
BETWEEN	AOKAUTERE LAND HOLDINGS LTD Applicant
AND	PALMERSTON NORTH CITY COUNCIL Respondent

Hearing: 20 May 2020

Counsel: G J Woollaston for the Applicant
N Jessen for the Respondent

Judgment: 25 May 2020

JUDGMENT OF CULL J

---

[1] Aokautere Land Holdings Ltd (Aokautere) seeks an interim injunction, restraining the Palmerston North City Council from taking any further steps in respect of the Notice of Requirement (Notice) for a new designation detailed under s 168 of the Resource Management Act 1991 (RMA). Aokautere is seeking to halt the decision-making process, which is to determine whether land owned by Aokautere is to be acquired by the Council for the purpose of a proposed connection road to State Highway 57.

[2] This injunction application turns on the adequacy of the Notice and on the service of the notice, which Aokautere says amounts to a flawed process, due to the aggregation of errors made by the Council.

Background facts

[3] Aokautere is a property developer in the Manawatu Region and has its registered office in Palmerston North. Aokautere owns the land in the Record of Title 895646, the title of which was issued on 14 June 2019. The legal description of 895646 is Lot 2 DP 484516 and Lot 694 DP 500578 and Lot 695 DP 509873 and Lot 1102 DP 519561. This Record of Title was a result of consolidation and the cancellation of Records of Title 817001 and 686764. Record 895646 contains two lots of relevance to this application: Lot 2 DP 484516 and Lot 1102 DP 519561.

[4] In 2018, Aokautere had informed the Council of its intention to develop the land into residential blocks, by way of subdivision. On the evidence filed by Mr Murphy, the City Planning Manager of the Council, Aokautere had itself originally intended to construct a road between Abby Road and Johnstone Drive but was declined Resource Consent as its proposed method of construction was contrary to the Council's Earthworks Policy. In late 2018, Aokautere applied for Resource Consent to subdivide the land into six residential lots. The consent application revealed that Aokautere no longer intended to develop a road connection between Abby Road and Johnston Drive, but continued building a residential subdivision at the end of Abby Road. Mr Murphy explains the Council grew concerned that this proposed development would be "suboptimal" for access and connectivity, and would prevent the development of a road between Abby Road and Johnstone Drive. The Council then considered the road could be acquired as a public work, under s 168 of the RMA.

[5] Negotiations between Aokautere and the Council continued throughout 2019 in an attempt to reach agreement as to road design, construction and potential land swaps. Those negotiations were apparently unsuccessful as in late November 2019 Aokautere sought to progress its subdivision consent application. Mr Murphy explains he was concerned that the subdivision, as proposed, would prevent the Council from building the desired Abbey Road to Johnston Drive connection and sought to progress a notice of requirement before any resource consent could be granted.[1] The resource consent hearing in respect of the subdivision took place in early April 2020.

---

1 Affidavit of David Murphy, at [16].

[6] At the centre of the dispute between Aokautere and the Council is the Council's proposal to develop the road connection between Abby Road and Johnston Drive. The proposed road would run through Aokautere's land. Mr Murphy explains in his affidavit that Abby Road finishes without any cul-de-sac turning head and simply terminates at Aokautere's land.

[7] Meanwhile, the Council prepared a s 168 Notice of Requirement for the purposes of a new designation for a road. The material was lodged with the Council in its capacity as consent authority on 18 December 2019, as part of the process provided under the RMA.[2] Under s 168 of the RMA a local authority, who has financial responsibility for a public work, must give notice to a territorial authority of its requirement for a designation for a public work. In this case the Palmerston North City Council is both the applicant and the territorial authority responsible for granting the Notice. Under s 168A of the RMA, the requiring authority (the Council itself) requested public notification of the notification decision, i.e. the decision whether or not to grant requirement of the site for the proposed connection road. Public notice was duly given and the Notice was sent to Aokautere at its rating address as an identified interested party. Aokautere challenges that service was validly affected.

[8] The Council received four submissions on the Notice, including a detailed one from Aokautere. The Independent Hearing Commissioner (the Commissioner) has been approved "to hear and determine the Requirement" as to whether the Council can acquire the site for the proposed connection road. The application has not yet been heard. The Commissioner proposed the Council, as the requiring authority, coordinate prehearing meetings with all the submitters before the hearing. Mr Murphy deposes that, instead of attending a prehearing meeting, Aokautere has filed the current application for an interim injunction.

[9] Since the filing of the interim injunction, Aokautere's subdivision consent application has now been heard by the Council and was refused. Aokautere participated in the consent hearing and challenged the validity of the Notice, as part of the subdivision resource consent process. The consent hearing panel declined that

---

2 Resource Management Act 1991, ss 166-186.

request on the basis that it was effectively a "collateral challenge," which should properly be determined by the Commissioner that had been appointed for the purpose of determining the Notice of Requirement under s 168(A) of the RMA.

[10] Aokautere, through its solicitor, received a copy of the Notice on or about 20 January 2020 and filed submissions within the prescribed timetable by 17 February 2020. Aokautere challenged the legality of the Notice in its filed submission before the Commissioner.

[11] In a Minute of 17 April 2020, the Commissioner advised the parties that he was "not in a position to make a determination" on the legality question, as:

> ...this is not a matter that I have jurisdiction over in terms of the delegation I hold from the Council. There are other more appropriate avenues to have that legal issue determined if that is to be pursued at all.

The Commissioner urged Counsel for the respective parties to endeavour to resolve this legal issue in advance of the hearing so that the proceedings could focus on substantive RMA matters under s 171 of the RMA. He believed he did not have jurisdiction to determine it.

[12] As a result of the Commissioner's Minute, Aokautere filed these proceedings in the belief that it had no other recourse, than to pursue urgent relief in the High Court. Aokautere then filed this interlocutory application for interim injunction without notice. On 1 May 2020, the without notice proceeding came before Churchman J, who declined the application to proceed on a without notice basis and directed that Aokautere promptly serve a copy of all documents filed in support of its application and a copy of his decision on Council.[3]

[13] At this hearing following the service of these proceedings, the Council appeared to oppose Aokautere's application for injunction, on the grounds Aokautere would not suffer harm if the injunction was refused. It would remain entitled to raise its objections and challenge the validity of the Notice under part 8 of the RMA before the Commissioner and by the exercise of any right of appeal to the Environment Court.

---

3 *Aokautere Land Holdings Ltd v Palmerston North City Council* [2020] NZHC 873 at [32]-[33].

[14] Aokautere challenges both the validity of the Notice, claiming it contains errors in the description of the land titles, and challenges the form of service.

Relevant principles of interim injunctions

[15] The relevant principles upon which an interim injunction should be decided have been long established in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*.[4] The relevant principles have more recently been confirmed by the Court of Appeal in *New Zealand Tax Refunds v Brooks Homes Ltd*.[5]

[16] The first threshold is an applicant must establish is the serious question to be tried. The second is whether the balance of convenience in granting injunction relief favours the applicant or the judgment creditor and the receiver. Finally, an assessment of the overall justice of the position is required as a check.

[17] I turn then to consider all three limbs of the threshold test.

A serious question to be tried

[18] Aokautere seeks a declaration, on an interim injunction basis, that the Notice is invalid and all designation proceedings or processes arising from it should stop. The Council has agreed that there should be a halt to the processes before the Commissioner, until this application is determined.

[19] This injunction application turns on two principle challenges. Aokautere claims the Notice is invalid because:

(a) The description of the "site" at which the roading access is to occur has been wrongly described as:

(i) Lot 2 DP 484515 in the title 686764, when it should be Lot 2 DP 484516 and title 686764 has been cancelled; and

---

4 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 29 (CA).
5 *New Zealand Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12].

(ii) Lot 1102 DP51956 in title 817001 is incorrect as title 817001 has been cancelled.

(b) The Council purported to serve the Notice on a private residence of Aokautere, where rate demands were sent and not on Aokautere's registered office.

[20] In support of its application, Aokautere filed an affidavit from Mr Fugle and a draft Statement of Claim seeking a declaration of invalidity of the Notice, breach of statutory duty and a permanent injunction. At the hearing, Mr Woollaston abandoned the claim for breach of statutory duty and sought a declaration by way of judicial review, on the basis of procedural irregularities. The proposed amendments to the draft Statement of Claim were made orally, and no objection was taken by the Council to proceeding by way of judicial review.

[21] I propose to deal with the serious question to be tried by addressing the following three factors:

(a) the materiality of the error in misdescribing the title references;

(b) whether Aokautere was incorrectly served with the Notice and the materiality of such service; and

(c) whether s 296 of the RMA is a bar to this Court giving relief.

Materiality of the misdescription of the title references

[22] In assessing whether a serious question is to be tried, the Court must evaluate the merits of the applicant's claim and, where necessary, fully examine the legal issues involved. Given the applicant's change of course in its substantive proceeding, this application should be treated as an interim order under s 15 of the Judicial Review Procedure Act 2016, although the application has not been pleaded or framed in that way. However, I embark on the assessment of the merits of Aokautere's application,

on the threshold of a serious question to be tried and not a *prima facie* case, despite this being a challenge to procedural matters.[6]

[23] The only issues before this Court as framed by Aokautere, is "the adequacy" of the Notice and its service. Aokautere argues that the aggregation of errors in relation to "the Lot numbers, title references, and associated information" within the Notice renders the Notice invalid and prejudicial.

[24] The Council acknowledges that there are misdescriptions in the Notice, but says they are immaterial and can be modified under part 8 of the RMA.[7] The Council accepts that the correct title reference should have been 53 Johnstone Drive and 54 Johnstone Drive, Palmerston North, legally described as Lot 2 DP 484516, Lot 694 DP 500578, Lot 695 DP 509873 and Lot 1102 DP 519561. The error in the description arises from a misplaced digit five instead of six on Lot 2 DP 484515(6). The second reference to Lot 1102 DP 51956 was the predecessor title, which was cancelled. The subsequent titles were issued as acknowledged by the Council.[8]

[25] The Notice comprises a document with a summary of the description of the site at which the activity is to occur and the full names and addresses of the owners and occupiers of the site. Attached to the Notice is a Planning Report and Assessment of Environmental Effects as required by schedule 4 of the RMA, together with a traffic Report and Assessment and a Landscape Assessment. The document contains 126 pages, including coloured photos, both aerial and in marked-up map form, showing photos of the proposed intersection and roadway through Aokautere's land. The detail of the assessments and reports have been completed by relevant experts and fully describe what is proposed in the designation for the roadway. Aokautere accepts that the description and depiction of the site at which the activity is to occur is correct.

[26] I uphold the Council's submission that the Notice makes it clear which land is in question, both in description and by way of detailed photos, and there is no material

---

6 Andrew Beck and others, *McGechen on Procedure* (Online loose-leaf ed, Brookers) at HR 7.53.04 (2).

7 Resource Management Act 1991, s 168A(4)(b).

8 The cancelled titles were respectively 817001 and 686764, both of which were cancelled on 14 June 2019.

risk that prospective submitters, or registered proprietors, were misled by the title misdescriptions.

[27] On an assessment of procedural unfairness on an interlocutory injunction basis by way of review, I do not consider there has been any procedural unfairness of any substance, particularly as Aokautere was not confused and was fully aware that the Notice related to its land, despite the misdescription. The fact that there is another registered proprietor in Auckland owning the misdescribed Lot 2 DP 484515 is of no consequence in this context.

[28] Aokautere filed substantive submissions in response to the Notice and could not point to any prejudice that it had suffered in dealing with the misdescription. I consider that the misdescription or error does not of itself lead to invalidity of the entire process. Whata J in *Target Painters and Decorators Ltd v Fehl* accepted that an error in completing a mandatory requirement of a statutory notice whilst made, was an error without any substance and no procedural or substantive unfairness occurred.[9] I reach the same view here.

[29] I also reject the analogy that Aokautere draws between a form 18 RMA Notice of Requirement and Notices given under s 119 of the Property Law Act 2007 (PLA). Under the RMA, a decision maker under part 8 has a discretion to "modify a requirement" and there are no equivalent powers in respect of s 119 PLA Notices. Mr Jessen for the Council has indicated that he will invite the Commissioner to consider the power of modification in the forthcoming hearings.

Was Aokautere incorrectly served with the Notice?

[30] The essence of Aokautere's challenge is that when the Council gave notification of the Notice, it did not properly serve Aokautere, because it posted the Notice to 5 Coutts Way, Palmerston North. This was a residential address to which rates invoices are sent for the Aokautere property.

---

9 *Target Painters and Decorates Ltd v Fehl* [2019] NZHC 3237 at [24]-[33].

[31] Aokautere submits that service of documents under s 352(3) of the RMA should be by way of service on an officer of the body or on the registered office. This allegation forms the basis of Aokautere's claim that the notification process is invalid.

[32] Aokautere was sent the Notice with the attached documentation to its rating address. This is the address the Council holds for the landowner and consistent with its practice, the Council treats it as the place to serve documents or Notices, as the address has been supplied by the landowners. The Council submits that the Notice was properly served under s 352(1)(b), being delivered at the usual or last known place of residence or business of the person. The Council concedes that if that position is incorrect and service was required under s 352(3) of the RMA, Aokautere's complaints about service are trivial and do not require an injunction.

[33] Aokautere maintains that it never received the Notice at 5 Coutts Way but Mr Woollaston, as Aokautere's solicitor, received an email from Mr Jessen on 30 January 2020. I was informed by Mr Jessen that the date on the service letters was 17 January 2020. Submissions were due by 17 February 2020 and Aokautere filed substantive submissions, including its challenge to the validity of the Notice and its process, despite the truncated timeframe.

[34] I consider this alleged procedural defect to be insubstantial. As in *Target Painters*, I consider that if there was any irregularity, it does not convert into unfairness or prejudice to Aokautere.[10] Aokautere received the Notice, made submissions, albeit in a reduced timeframe, and exercised its right to participate in the s 168 hearing process, when it lodged a 17-page, 90 paragraph written submission. Even Mr Woollaston conceded there was no actual prejudice.

Is s 296 of the RMA a bar to this Court giving relief?

[35] The most telling factor in this assessment of a serious question to be tried is s 296 of the RMA, which is a bar to this Court giving relief either by way of judicial review or in the nature of an injunction, where there is a right of appeal or an inquiry to the Environment Court. Section 296 provides:

---

10 Above n 9, at [32].

> **296 No review of decisions unless right of appeal or reference to inquiry exercised**
>
> If there is a right to refer any matter for inquiry to the Environment Court or to appeal to the Environment Court against a decision of a local authority, consent authority or any person under this Act or under any other Act or regulation—
>
> (a) no application for review under the Judicial Review Procedure Act 2016 may be made; and
>
> (b) no proceedings seeking a writ of, or in the nature of, mandamus, prohibition, or certiorari, or a declaration or injunction in relation to that decision, may be heard by the High Court—
>
> unless the right has been exercised by the applicant in the proceedings and the Environment Court has made a decision.

[36] Mr Woollaston relies on *Reuters Homes Ltd v Whanganui District Council* where the Court determined the lawfulness of the notification decision made by the Council, preceding the formal resource consent decision.[11] Dobson J noted that the step in the exercise of a statutory power is the decision to require public notification under s 95C, being one of the provisions "where the [RMA] does not give the Environment Court power to make a declaration."[12] Dobson J noted that a reasonable justification for that exclusion from the Environment Court's jurisdiction is that complaints about decisions under s 95C of the RMA relate to the compliance by the Council for the purposes for which it was to operate under the relevant section. Essentially, the Council used the wrong section to change an RMA application.

[37] By comparison, the procedural defect challenges by Aokautere can be heard and determined by the Commissioner. There is then a right of appeal to the Environment Court. There is no exclusion of the Environment Court's jurisdiction.

[38] The validity or otherwise of the Notice in the context of a s 168 RMA hearing should be addressed by the Commissioner. As I have already found, there is an insubstantial basis for finding that there is a serious question to be tried for the purpose of interim relief. In addition, the s 296 bar to this Court hearing an injunction

---

11 *Reuters Homes Ltd v Whanganui District Council*, (2011) 16 ELRNZ 493 (HC).
12 At [36].

application or judicial review application is a difficult hurdle for Aokautere to overcome.

[39] I accept Mr Jessen's submission that a decision maker under part 8 of the RMA has an express discretion to "modify" a requirement under s 168A(4). The Council intends to ask the Commissioner to modify the Notice to refer to the titles correctly and Mr Woollaston, in turn, is intending to object to any modification.

[40] I consider that this is precisely the area that the Commissioner should rule upon, given the specialist knowledge of Commissioners in RMA matters. Further, s 296 statutorily bars the High Court from giving injunctive relief, when there is a right of appeal to be exercised.

[41] I am unable to uphold Aokautere's submission that there is a serious question to be tried by this Court. I turn then to consider for completeness, the balance of convenience.

Balance of convenience

[42] From the above, it is plain that the balance of convenience favours the Council. The s 168 RMA hearing should proceed before the Commissioner and he should make a determination on the parties' submissions, including whether the Notice is invalid. In this way, the jurisdiction over RMA processes are accorded their specialist jurisdiction, complete with an appeal to the Environment Court, in the event that either party wishes to exercise such a right.

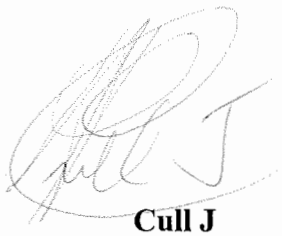
Overall justice

[43] The overall justice assessment is a check on the position reached following the analysis of the first two limbs of the threshold test. I am satisfied the overall justice of this case does not require interim relief and that the processes under the RMA in this case should be conducted, as the RMA provides, before the Commissioner without further delay.

Conclusion

[44] The threshold for interim relief by way of injunctive relief has not been reached. There is not a serious question for this Court to try and the balance of convenience favours the Council. Further, the overall justice in this case does not favour issuing an interim injunction. The interim injunction application is dismissed.

[45] If Counsel cannot agree on costs, memoranda may be filed within 15 working days of this decision.



Cull J

Solicitors:
Dewhirst Law, Palmerston North for the Applicant
Cooper Rapley Lawyers, Palmerston North for the Respondent