Resource Management Tips for Commercial & Property Lawyers

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LIM report leads to liability for errors over partial water rights transfer

The recent Court of Appeal case of *Vining v Altimarloch* [2010] NZCA 104 confirms the long held expectation that councils can be held liable in negligence for errors and omissions in the issue of a LIM report. In *Altimarloch* the LIM report omitted information about the partial transfer of water rights. This information was known to the Marlborough District Council, but not disclosed in the LIM report. The absence of advice over the partial transfer of water rights was also held to be a misrepresentation by the vendor's real estate agent and solicitor. The defendants to the proceedings have now sought leave to appeal to the Supreme Court (at the time of writing, a decision on the leave application is awaited). The underlying facts of the case provide a cautionary tale (continued on page 5).

Pre 1940 demolition controls for Auckland's residential 2 zone

The Auckland City Council under direction from the Environment Court has called for submissions on Plan Change 163 to the Auckland City (Isthmus) District Plan. Submissions are open on the residential 2 planning maps which identify properties that will have more stringent building demolition and removal controls. These controls affect whether resource consent is likely to be granted for demolition or removal, and as a result, whether a new dwelling can be built on the section. To check whether a property is affected, the maps can be viewed online at: www.aucklandcity.govt.nz/council/services/zoning/changes2.asp. Submissions close 9 July and are likely to be heard by the Environment Court prior to the end of the year, or early 2011. The trade association for the house movers continues its appeal to the Environment Court against "blanket" controls on demolition and removal which apply to all pre-1940 dwellings in the residential 1 and residential 3 zones.

Discount for delay regulations: will they work?

One of the 2009 amendments to the Resource Management Act requires all local authorities to have a discount policy for administrative charges in respect of consents not processed in time. The Resource Management (Discount on Administrative Charges) Regulations 2010 come into effect on 31 July 2010 and provide a 'default' discount. The regulations provide for a sliding scale discount of up to a maximum 50 percent, at 1 percent per working day, when the processing of a resource consent exceeds the timeframes in the RMA. This will apply to both non-notified and limited notified resource consent applications. Councils are able to create discount polices that differ from the default policy in the regulations but only if the discount is greater.

> "The risk is that the discount regulations will create perverse incentives for councils to increase costs associated with consent processing, and that councils will more frequently return applications as incomplete"

While the regulations are expected to reduce delays in processing consent applications there is concern that this will come at a high cost. The risk is that the discount regulations will create perverse incentives for councils to increase costs associated with consent processing, and that councils will more frequently return applications as incomplete under section 88 RMA. Currently applications are often made without all consultation requirements

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leading the council to request further input from external parties while the council makes a start on processing the application. The discount regulations may encourage councils to return incomplete applications to prevent the time clock from starting.

Auckland Council all go for 1 November 2010

On 1 November 2010 the new Auckland Council will take over the functions of existing local authorities within the region. The final legislative steps for creation of the Auckland Council were approved by Parliament on 14 June 2010. The legislation (consolidated to include amendments) is:

- Local Government (Tamaki Makaurau Reorganisation) Act 2009
- Local Government (Auckland Council) Act 2009
- Local Government (Auckland Transitional Provisions) Act 2010.

General Counsel appointed

Wendy Brandon has been appointed General Counsel for Auckland Council, and is to manage an in-house legal staff of 15 to 20 lawyers (down from 50 in-house solicitors in the existing local authorities).

Coastal hazard rules to bite deep

The Ministry for the Environment has released a draft paper outlining a proposed National Environmental Standard (NES) on future sea level rise. The NES, once publicly notified, is expected to standardise approaches by district and regional councils towards projections for future sea level rise. This will be relevant to the ability to build on coastal properties, and to establishing building floor levels. At present district and regional councils approach this issue on a case-by-case basis through district and regional plans. The NES will reduce litigation risk for local authorities by taking a standardised approach which local authorities will be obliged to follow.

In addition the Minister of Conservation is currently considering the report of the Board of Inquiry into the Proposed New Zealand Coastal Policy Statement. Through the potential NES on sea level rise, and the likely decisions on the New Zealand coastal policy statement, it is anticipated local authorities will be encouraged to consider policies of "managed retreat" of the coastline over construction of engineered structures such as seawalls. It can be predicted that obtaining consent will become increasingly difficult for residential development on land at risk from coastal hazards.

Court confirms ability of EQC to decline cover for land subject to hazard notice registered under the Building Act

In *Doyle v Earthquake Commission* [2009] NZRMA 546 the High Court upheld (in part) the decision by EQC to decline cover when a disastrous rainstorm hit the coastal town of Russell in Northland, causing a slip, which slid down the hill, demolished a bathroom, and caused internal damage to the Doyle's holiday bach. EQC declined the Doyle's claim as the property was subject to a notice issued by the Far North District Council under section 36 of the Building Act 1991 (the predecessor to section 72 Building Act 2004). The notice recorded that the land was likely to be subject to inundation, and erosion. In *Doyle* the High Court upheld the discretion by EQC to decline cover where a hazard notice was registered but also held EQC's ability to decline cover for natural disaster damage was limited to the types of natural hazards listed in the registered notice.

On the facts, the case turned on the meaning of "inundation" (one of the hazards listed on the notice registered against the title). The High Court held that EQC were entitled to decline to indemnify the Doyle's in part for the cost of removing the slip from its place of rest as that was "inundation" within the meaning of the notice registered against the title. An appeal to the Court of Appeal over the judgement did not proceed, so this aspect of the Court's decision was unfortunately not further tested.

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EQC claims to be made within 30 days of occurrence of natural disaster (or up to 3 months)

EQC has a statutory time limit for reporting of claims. The starting point is that an insured is required to give notice to EQC within 30 days of the occurrence of any natural disaster damage. However, the period for reporting may be extended, if:

- the natural disaster damage is not immediately apparent; or
- the insured is unable by absence or incapacity or other disability (proved to the satisfaction of EQC) to give notice within 30 days–

then the time for giving notice may be extended for up to 3 months, provided EQC is not prejudiced by the lapse of time. It has been held that the Earthquake Commission Act 1993 (clause 7 of the Third Schedule) provides a statutory long stop provision, so that if a claim is not made within three months of the damage taking place then, even absent prejudice, the claim is out of time: see *Coughlan v Earthquake Commission* [2007] NZAR 532 (HC).

Auckland Council to provide regional consent information when providing LIM reports

The obligation to provide LIM reports applies to territorial authorities, rather than regional councils: see section 44A(2) Local Government Official Information and Meetings Act 1987. However an implication from the recent Court of Appeal decision in the *Altimarloch* case *(noted at page 1, above)* is that post 1 November 2010 the new Auckland Council, as a unitary authority, will acquire responsibility to provide information concerning water and other regional council consents when issuing LIM reports. In *Altimarloch* the Court of Appeal accepted that Marlborough District Council as a unitary authority is *"a territorial authority with additional functions, rather than a regional Council or a hybrid"*, and that all consent information (including that traditionally exercised in respect of regional council functions) was to be provided in the LIM report.

Greater sophistication needed for information requests to Councils?

At the recent Lexis Nexis *Local Government Law Conference*, the Office of the Ombudsmen noted that detailed requests for the supply of information by central government agencies were common, but the same degree of detail was often lacking when it came to requests made of local government. It follows that information requests of local government could usefully become more sophisticated given predictions that 70 – 80% of decisions by the new Auckland Council are expected to be made under delegated authority by unelected officials.

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The following points were made for information requests under the Local Government Official Information and Meetings Act 1987 (LGOIMA):

- Requests must be made with "due particularity": section 10(2)
- While Council's have a default response period of 20 working days, the Act provides for information requests to be made on an urgent basis to shorten the usual response period. Where a request for urgency is made under section 10(3) reasons for the urgency are to be provided. A failure to provide information on an urgent basis could itself be the form of a complaint to the Office of the Ombudsmen.
- Every local authority has a duty under section 11 to provide "reasonable assistance". Under this duty, local authorities can be asked what files are kept, and whether any electronic document management system is searchable, etc.
- There is a right of access to copies of internal rules, policies and guidelines affecting decision-making: section 21.
- When a local authority makes any decision or recommendation in respect of any person, then there is a right of access under section 22 to reasons for that decision.
- Under section 27 any decision by a local authority to refuse to provide information, or which imposes conditions on the use of that information can be reviewed by the Office of the Ombudsmen.

High Court confirms starting point for dairy effluent prosecutions

In *Yates v Taranaki Regional Council* (High Court, New Plymouth, 14 May 2010) Justice Mackenzie approved a framework and scale of penalties for offending involving discharge of dairy effluent, by

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endorsement of the District Court decision in *Waikato Regional Council v Chick*. The *Chick* case established a starting point for dairy effluent offences as follows:

- **Level 1 — least serious — $0 – $15,000.** This range of offending reflects unintentional one-off incidents occurring as a result of a system failure. There is little or no effect on the environment.

- **Level 2 — moderately serious — $15,000 – $30,000.** This range of offending reflects unintentional but careless discharges usually of a recurring nature over a period of time, or of incidents arising from the malfunction of parts of the system. It reflects at the most a moderate effect on the environment.

- **Level 3 — more than moderately serious — $30,000 plus.** This range of offending reflects the more serious offending that is deliberate, or if not deliberate, is occasioned by a real want of care. It is often associated with large plural discharges over time or one large one-off event.

The High Court appeal in *Yates* was decided prior to the significant increase of penalties from the Resource Management (Simplifying and Streamlining) Amendment Act 2009 which increased maximum fines under the RMA from $200,000 to $300,000 for a natural person, and $600,000 for corporates and unincorporated bodies. It is predictable that sentencing tariffs for offences under the RMA will continue to trend upwards reflecting the increase in the statutory maximum penalties.

Hearing sought on $300 infringement notice exposes defendant to penalty of $300,000!

Owners of a piggery prosecuted by way of an infringement notice (subject to a $300 "instant fine") issued by the Otago Regional Council received a nasty surprise on being told by the Court that having taken the step of seeking a hearing on the infringement notice, the piggery became susceptible to the full financial penalty regime of the RMA of up to $300,000. The situation arises from findings of the High Court in *Nelson City Council v Howard* [2004] NZAR 689. Fortunately for the piggery owners the Judge limited the penalty to $300 on each infringement offence because the summary of rights in the infringement notice failed to warn recipients as to the potential liability for a higher penalty than the infringement fee should defendants seek to deny liability or even seek to submit on penalty: see *Otago Regional Council v Bloem* (District Court, Dunedin, 15 March 2010, Dwyer DCJ).

One Auckland Council: one spatial plan

The Royal Commission on Auckland's governance recommended that Auckland needed a spatial plan. Part 6 of the Local Government (Auckland Council) Act 2009 requires the new Auckland Council to prepare a spatial plan. The spatial plan is to visually illustrate how Auckland is to develop in the future. This will be one of the major tasks of the new Council in its first years.

The spatial plan is to set out:

- how the region will develop in the future,
- the future location and mix of residential, business and industrial activities within specific areas,
- where critical infrastructure services will be located, for example water, sewerage and roads

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The spatial plan is be prepared via the special consultative procedure, similar to the annual plan process. For an indication of things to come in terms of spatial planning, the outgoing Auckland City Council has prepared draft area plans for the Auckland Isthmus area, setting out future growth within the Isthmus which can be viewed online at: **http://www.itsmybackyard.co.nz/areaplans/**. These area plans were to form the basis of the next Auckland Isthmus plan, but this has been deferred due to local government amalgamation.

Changes to when proposed rules take legal effect

Prior to the 2009 amendments to the Resource Management Act rules in proposed plans had legal effect upon notification of

a proposed plan. Now, a rule from a proposed plan will generally only have legal effect once decisions on submissions are made and publicly notified (sections 86A–86G RMA). The exception is that certain proposed rules will have immediate legal effect including rules to protect water, air, soil (for soil conservation), significant indigenous vegetation and fauna, and historic heritage, and any other rule where a Council has obtained an order from the Environment Court that the rule has interim effect.

> Any property at risk of losing permitted activity status through rules on a proposed plan should consider obtaining a certificate of compliance in advance of the proposed rules coming into legal effect

Certificates of compliance should be sought where activities are to lose permitted activity status

A certificate of compliance under section 139 of the RMA is treated as a resource consent, and will continue to authorise the activity even after the proposed rules come into legal effect which restrict the activity. The certificate of compliance however must be granted in advance of the proposed rules coming into effect i.e. prior to decision-making on submissions. It follows that any property at risk of losing permitted activity status through rules on a proposed plan should consider obtaining a certificate of compliance in advance of the proposed rules coming into legal effect. A Council must issue a certificate of compliance if the activity can be done lawfully on the site without a resource consent. For example, in the operative Tauranga District Plan Two independent dwelling units are allowed per site as of right as a permitted activity in the rural zone. However the proposed Tauranga City Plan (currently at the hearing stage) proposes to reduce the number of independent dwelling units to One per rural lot. Affected property owners in Tauranga rural zones with only one dwelling per lot should be making application for a certificate of compliance now for a second dwelling, before the rules change.

Property due diligence from your desktop

An excellent search tool for locating properties within the Auckland Region can be found online at **http://maps.auckland.govt.nz/Alggi/**. The search function (offering different views) can take a bit of getting used to, but once mastered this map service provides very helpful location information. Views can be selected showing aerial views, topography, and cadastral information–all searchable by street address. Altogether these maps provide a useful complement to Google Earth.

LIM report leads to liability for errors over partial water rights transfer

(continued from page 1)

In *Altimarloch Joint Venture Ltd v Moorhouse* (HC Nelson, CIV-2005-406-00009, 3 July 2008), Justice Wild held that the Marlborough District Council was liable to a purchaser of a farm property for negligent errors in a LIM report. In addition the Court held that the vendor, along with the real estate agent and the vendor's solicitor were liable in contract for misrepresentation. On appeal, the Court of Appeal upheld the High Court decision, but varied the contributions by which the defendants were liable. The Court held it was not open to the Council to disclaim responsibility or liability for the accuracy of the LIM report.

> A water permit granted to take or discharge water may be transferred in whole or in part to any owner or occupier of the site in respect of which the permit is granted: see section 136 RMA

The facts in Altimarloch

The vendors as owners of a farm in the Awatere Valley in Marlborough known as Altimarloch held three water permits of different natures (class A, B and C) entitling them to take water from a stream, and to store water on the property. In 2001, the owners subdivided the property and sold part to a developer, along with transferring all their class B water take entitlements and half of their class A entitlements. In 2004, the vendors then sold the balance of the property to purchasers who intended to establish a vineyard on the land and who required the availability of water for irrigation.

The purchasers were led to believe that all of the class A, B, and C entitlements originally held by the vendor were to be transferred to them on purchase of the balance of the land. It was the class

A entitlements which were valuable, as these allowed extraction of water direct from a stream. A water permit granted to take or discharge water may be transferred in whole *or in part* to any owner or occupier of the site in respect of which the permit is granted: see section 136 RMA.

Among other claims, the purchasers sued the Marlborough District Council alleging a number of causes of action including that the Council was negligent in the preparation of the LIM, which, due to a simple administrative oversight by a Council officer, did not include reference to the 2001 water permit transfers. On the facts, the Council was found to owe a duty of care to the purchaser and to be negligent, in that it had failed to update the details of the water transfer on the relevant Council file.

Section 44A(2) Local Government Official Information and Meetings Act states the matters that must be contained in a LIM, including information "concerning any consent … *affecting* the land … previously issued by the territorial authority". Despite water permits being personal in nature and not "attaching to the land" as do land use consents, the Court held that water permits do "affect the land" for the purposes of section 44A(2). The Court accepted the water permits are location and area specific.

A chapter of errors

The Court of Appeal found that the problem arose through the actions of multiple parties:

The Council

- In part the error was caused by the way in which the Council kept its records. The Council had changed its filing system. A search of the property file located the three original water permits, but not the transfer of some of the water entitlements. These were now held on a separate resource consent file.
- The Council supplied a LIM report to the purchaser's solicitors, which attached copies of the class A and class C water permits. The LIM report did not refer to the transfer of half of the class A water entitlements, and, in this respect, was in error. The Council officer issuing the LIM report overlooked the transfer of half of the entitlements associated with the original class A water permit.

Real estate agents for the vendor

- The Court found that at least one of the agents knew that some of the water entitlements had been transferred due to previous transaction. This was also overlooked at the time.
- An office assistant from the real estate agents was asked to make a search of the Council records prior to the issue of the LIM. The assistant carried out a search of the Council's property files only, not the resource consent files.
- The agent then supplied copies of the three water permits to a consultant for the purchaser, and to the solicitors acting for the vendor. The three permits were attached to the agreement for sale and purchase.

The vendor's solicitor

- The vendor's solicitor passed on to the purchaser's solicitor copies of the water permits supplied to him by the real estate agent.
- Based on the copies of the water permits (supplied to him by the real estate agent, and attached to the agreement for sale and purchase) along with a signed agreement, the vendor's solicitor formed the view (incorrectly) that the entirety of the original water permits were still available.
- The vendor's solicitor approved the form of contract, which attached to the three water permits, but did not enquire directly of the client as to the water permits held. The High Court Judge held that the solicitor's confirmation of the agreement was a further representation as to the availability of the three original water permits.
- On settlement the vendor's solicitor had the clients in his office to sign the transfer of land, but forgot to have them sign the transfers to the water permits. He then took the shortcut of forging the signatures on the transfers of the water permits, which were handed to the purchaser's solicitors on settlement.

Missed warning signals– purchasers due diligence

The Court of Appeal identified a number of warning signals missed by the purchaser and its advisers. This was relevant as there were claims of contributory negligence by the purchaser–albeit these claims against the purchaser failed.

The agreement for sale and purchase was subject to a due diligence clause requiring the purchaser to be satisfied as to water issues including "availability of advice to take water for irrigation purposes and the transferability of those rights to the purchaser". The water permits referred to an area of land which exceeded the size of the area being transferred to the purchaser. The significance of this discrepancy was not picked up by the purchaser or advisors, as was the significance of an easement in favour of the previous purchaser (who had acquired part of the water entitlements).

The defendant parties have now sought leave to appeal to the Supreme Court. At the time of writing the Supreme Court has yet to rule on whether leave to appeal will be allowed.

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