IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2008-043-000545

IN THE MATTER OF	The Public Works Act 1981 section 111A
BETWEEN	RUSSELL GIBBS AND PARANI GIBBS AS TRUSTEES OF THE GIBBS FAMILY TRUST Appellants
AND	VECTOR GAS LIMITED Respondent

Hearing: 27 April 2009

Counsel: J Pou for Appellants
B J Matheson for Respondent

Judgment: 27 April 2009

[ORAL] JUDGMENT OF HUGH WILLIAMS J

The appeal is dismissed.

The parties are to have 14 working days from receipt of the transcript of this judgment to endeavour to negotiate an agreement for "entry for survey and inspection" along the lines suggested. If the parties are unable to reach an agreement on that issue, leave is reserved to revert to the Court to resolve the precise terms on which entry will be permitted.

Costs should lie where they fall.

Solicitors:
Rangitauira & Co, P O Box 1693 Rotorua
Russell McVeagh, P O Box 8, Auckland 1140

Copy for:
Judge Roberts, New Plymouth District Court
Sandra Hopkins, High Court, New Plymouth

Introduction

[1] The appellants, the Gibbs Family Trust, own a farm at Tongaporutu. It has been in their family for well over a century. Their marae is on the land. There is a urupa on the land as well containing family ancestors. The land contains a number of waahi tapu and, as Mr Gibbs, one of the trustees, puts it:

> 7. Our atua, our mana and our mauri are here. We have an eternal connection to this land. We are the kaitiaki (guardians) of the land. We have an obligation to the tupuna (ancestors), Hapu and Iwi to associate with this land, and to our tamariki and mokopuna, to preserve and protect the sacred nature of this land and in particular the many Waahi Tapu located on it.
>
> 8. Acting as Kaitiaki of such an important taonga is a heavy burden and is one that we do not take lightly. We must ensure that the special significance of the land and the Waahi Tapu are preserved, protected and enhanced. We must also ensure that the proper protocols are followed at all times in relation to any activities on the land.

[2] The respondent, Vector Gas Ltd, is the owner of the Maui and Kapuni high-pressure natural gas pipelines. Both pipelines run through the Gibbs Family Trust's land. The pipelines are of national significance to the New Zealand commercial and residential community. They provide about 21% of the nation's energy supply and according to Mr Webb, Vector Gas' New Plymouth Operational Manager, their ability to function is a "critical supply issue" for the North Island.

[3] In 2005 a report was commissioned concerning the erosion of the coast in and near the Gibbs Family Trust's farm. The farm has a lengthy coastline onto the North Taranaki Bight and, at some parts of the passage of the pipelines, they are close to the coast. This appeal largely concerns the line which the Kapuni pipeline follows at Mangapokatea (also known to the parties as Locked Gate) although it seems that at that site it is the Maui pipeline which is the more seaward. Mangapokatea is about three kilometres south/south-west of the mouth of the Tongaporutu River and the other site with which this appeal is principally concerned, the Te Rua Taniwha

(otherwise known to the parties as Twin Creeks) is about another three kilometres south/south-west of Mangapokatea.

[4] It is agreed between the parties that erosion at those and other sites on the coastline threatens the continuing operation and viability of both pipelines, although the rate at which the threat will magnify is not as yet known.

[5] It therefore follows that the appeal concerns what are, for the present, opposing parties, being those who know the land best, and those who know the technical problems relating to any realignment of the pipelines best. The appeal also relates to persons or entities who are required to have an ongoing relationship well into the future.

Application

[6] On 2 December 2008 Vector Gas applied to the New Plymouth District Court, under the Public Works Act 1981 s 111A, for an order permitting it to enter the Gibbs Family Trust's land for the purposes of "undertaking surveys and inspections", details of which were in an attached schedule.

[7] That application was opposed by the Gibbs Family Trust on a number of grounds, including the omnibus ground that Vector Gas had not taken all reasonable steps to negotiate an agreement for entry to discuss Mangapokatea and the work required in that general location. The Gibbs Family Trust also opposed on grounds concerning the cultural and personal significance of the land to them. As mentioned, the trustees regard themselves as being kaitiaki of the land and as required to protect the mauri of the land in accordance with tikanga.

[8] They say that they wanted Vector Gas to participate in negotiations leading to an agreement to enable realignment to be initially assessed at Mangapokatea. But they also required Vector Gas to meet its outstanding commitments at Te Rua Taniwha, pursuant to a realignment agreement the parties reached there, before any further work was undertaken on the Kapuni pipeline at Mangapokatea.

District Court Judgment

[9] The matter came before Judge Roberts, in the New Plymouth District Court, earlier this year and in a reserved judgment delivered on 27 February 2009 the Judge overruled the Gibbs Family Trust's objection and made an order in Vector Gas' favour.

[10] He first cited s 111A and the Gibbs Family Trust's objections. He then detailed the material he had taken into account in reaching his decision and the work which was required, including the details in the schedule to the Court application.

[11] The Judge recognised the bases of the Gibbs Family Trust's objection but took the view that (at [9]):

> ... certain irrelevant matters had been factored into [Mr Gibbs'] considerations to the end that an "impasse" had been reached and no amount of time or negotiation between the parties would secure resolution or agreement.

[12] After then briefly detailing the negotiations between the parties, the Judge reached the view that the orders should be made. In doing so he again took the view that (at [19]):

> ... irrelevant matters have impacted on the process to the end that the endeavours to negotiate an agreement have been thwarted.

[13] For some reason, the Judge did not impose conditions on the Vector Gas application. Though conditions were included in the draft order submitted to the Court shortly after delivery of the judgment, they have not been the subject of any order by Judge Roberts and they have not been agreed by the Gibbs Family Trust.

Legal issues

[14] Turning to legal issues, s 111A of the Public Works Act 1981 reads:

> **111A Powers of entry for survey and investigation purposes other than by Minister or local authority**

(1) In this section, developer means—

(a) ...

(b) ...

(ba) A network utility operator within the meaning of section 166 of the Resource Management Act 1991 which has approval as a requiring authority under section 167 of that Act; or...

(2) Where a developer wishes to undertake a survey or other investigation on any land for the purpose of gathering information necessary for any application for any right, designation, consent, or permit, or for the preparation of any report, required for any proposed development, the developer may, upon giving the owner and occupier of the land not less than 10 working days' notice of its intention to do so, apply to the District Court for an order under this section.

(3) On being satisfied that the proposed survey or investigation is necessary for the purposes of the proposed development, that the proposed development may properly be undertaken by the developer, and that the developer has taken all reasonable steps to negotiate an agreement for entry, the Court may make an order authorising the developer to:

(a) Enter and re-enter the land at reasonable times, with or without such assistants, aircraft, boats, vehicles, appliances, machinery, and equipment as are reasonably necessary for making any kind of survey or investigation:

(b) Dig and bore into the land and remove samples of it.

(4) Every order made under this section shall specify—

(a) How and when entry is to be made; and

(b) The specific powers intended to be exercised; and

(c) Such other conditions as the Court thinks fit to impose.

(5) Before exercising any powers authorised by an order made under this section, the developer shall serve the order on the owner and occupier of the land to which the order relates.

(6) Every officer, employee, or agent of a developer acting in pursuance of an order made under this section shall have with him or her and shall produce on initial entry and if required to do so, evidence of his or her authority and identity.

(7) The developer shall fully compensate every person having any right, title, estate, or interest in any land or property injuriously

> affected by the exercise of any of the powers authorised by an order made under this section for all loss, injury, or damage suffered by that person.
>
> (8) In default of agreement between the parties, claims for compensation under this section shall be made and determined within the time and in the manner provided by Part 5 of this Act, and the provisions of that Part shall, as far as they are applicable and with the necessary modifications, apply with respect to claims under this section.

[15] Counsel submitted there appears to be no precedent concerning the construction of s 111A. They referred to *Gray v Minister of Land Information* (A117/2000 EC 2 October 2000 Judge Sheppard) but there the tests were somewhat different. Some helpful guidance - though it is not directly on point - can be derived from the decision of a five Judge Court of Appeal in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671. There the airport authority was required to consult with users before setting airport charges and the Court of Appeal said (at 674):

> The word "consultation" does not require that there be agreement as to the charges. On the other hand, it clearly requires more than mere prior notification. The leading authority as to a requirement for consultation is *Port Louis Corporation* v *Attorney-General of Mauritius* [1965] AC 1111. Lord Morris of Borth-y-Gest, delivering the judgment of the Privy Council, said at p 1124:
>
> > "Their Lordships were referred to observations made in regard to consultation in certain decided cases (*Fletcher* v *Minister of Town & Country Planning*; *Rollo* v *Minister of Town and Country Planning*; In re *Union of Benefices of Whippingham and E Cowes*.) Helpful as the citations were, the nature and the object of consultation must be related to the circumstances which call for it. The situation to which section 73(1) relates is clear. If there is a proposal to alter the boundaries of a town, or the boundaries of a district, or the boundaries of a village, such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries. The local authority must be told what alterations of boundaries are proposed. They must be given a reasonable opportunity to state their views. They might wish to state them in writing or they might wish to state them orally. The local authority cannot be forced or compelled to advance any views but it would be unreasonable if the Governor in Council could be prevented from making a decision because a local authority had no views or did not wish to express or

> declined to express any views. The requirement of consultation is never to be treated perfunctorily or as a mere formality. The local authority must know what is proposed: they must be given a reasonably ample and sufficient opportunity to express their views or to point to problems or difficulties: they must be free to say what they think."

[16] Similarly, the Court of Appeal observed (at 676):

> We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement. ... for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses. The process is quite different from negotiation, however.

[17] When s 111A(3) is seen in the light of those authorities, it is clear that the phrase "all reasonable steps" is not absolutist. The section does not require all conceivable steps to be undertaken before the Court can make an order pursuant to the powers conferred in s 111A. What the phrase must be taken to require is that all steps must be taken which, objectively assessed, are considered reasonable in all the circumstances of the matter or the application actually between the parties. And then, if agreement eludes them, it is for the Court to make that objective assessment.

Submissions

[18] Both counsel filed and addressed helpful submissions.

[19] For the Gibbs Family Trust, Mr Pou carefully set out the Trust's position, drawing on their requirements for the outstanding matters concerning Te Rua Taniwha to be cleared away and resolved before any other matters, including Mangapokatea, relating to the pipelines, could be considered.

[20] In relation to a request for all Standing Committee minutes containing entries relating to the Trust's property to be disclosed, Mr Pou made the point that the Trust is well able to comply with any confidentiality requirements and that it is not, and never will be, a commercial competitor for Vector Gas.

[21] There was an issue about the disclosure of some desktop material. That appears now to have been resolved with the provision of that material by Vector Gas once the family trust's request's, through Mr Pou, had been properly assessed.

[22] There is an issue about disclosure of material concerning the Gibbs Family Trust's property to surveyors and thence to the New Plymouth District Council.

[23] Mr Pou expressed concern about the necessity for further work and the likelihood of disagreement between these parties. He said:

> It is artificial and illogical to suggest that actions concerning the previous project are irrelevant when considering the next project. The parties are the same. The issues are the same. The subject matter is the same. It is on the same block of land. It is based on the same coastal erosion report and the two events are recent in time. The Court must have regard to this as the surrounding circumstances of the case.

[24] For Vector Gas, Mr Matheson, too, carefully recounted the history of this matter and the circumstances which led, first, to the hearing in the District Court and now to this appeal. He said:

> If a landowner were able to prevent access to its land simply by not agreeing or demanding that unreasonable preconditions be met, then it would be very difficult for those seeking to construct or maintain public works to determine whether the land is suitable for a public work. If so, how much land is needed and what specific mitigation is required.

Discussion and Decision

[25] In deciding whether the Gibbs Family Trust has demonstrated Judge Roberts fell into error, it is first to be noted that there are three requirements in s 111A(3). Two are agreed.

[26] There is no contest that "the proposed survey or investigation is necessary for the purposes of the proposed development". Both parties agree that realignment of the Kapuni pipeline at Mangapokatea is necessitated and is clearly required in terms of the coastal erosion report to which the evidence referred. There is a slight difference of opinion as to how that report came to be ordered/commissioned but that is of no moment to the outcome of the case.

[27] The second condition is that "the proposed development may properly be undertaken by the developer". There is no contest that Vector Gas4 is a "developer" in terms of s 111A(1) and that it has the power to undertake the work properly.

[28] The third question, of course, and the critical question as far as these parties are concerned is whether Vector Gas has taken "all reasonable steps to negotiate an agreement for entry".

[29] It is first helpful to say what this judgment is not about.

[30] The first thing it is not about is the actual realignment of the Kapuni pipeline at Mangapokatea. What is proposed is entry for "survey and inspection" in the terms later discussed. If the proposed realignment comes to fruition or work is proposed to commence, then clearly it will need discussions as to feasibility, route, timing, the method by which the realignment is to be undertaken and extensive consultation between the Gibbs Family Trust as landowners and Vector Gas as the pipeline owner. So this judgment and the District Court judgment are not about the realignment itself. It is about the preliminary step of entry for "survey and inspection".

[31] The second matter this judgment is not about - even though this may come as a disappointment to the Gibbs Family Trust - is Te Rua Taniwha. It is, of course, true that the work at Te Rua Taniwha and the proposed work at Mangapokatea follow one another in relatively short order in time. It is true, too, that they are based on the same report and, of course, they deal with the same pipeline. But it is, in the Court's view, mere happenstance that the parties turn out to be the same. There are obvious differences between the work at Te Rua Taniwha and the work proposed to be undertaken at Mangapokatea and what is critical is that the work and, now, the differences between the parties concerning Te Rua Taniwha are covered by a contract which the parties negotiated some three years ago. There may be work outstanding under the contract. Indeed, Vector Gas accepts that there is some work outstanding. But the remedies of the parties concerning Te Rua Taniwha are remedies under contract. They are not the exercise of powers under statute and, in particular, do not concern the application to the Court under s 111A.

[32] Importantly too, the contract between the parties concerning Te Rua Taniwha contains a dispute resolution procedure which the parties have not yet completed. It involves an arbitration and, conceivably at least - although probably fairly unlikely - the result of any such arbitration in due course may end up in litigation before this Court.

[33] What this judgment is thirdly not about is provision of the disclosure of the various documents. The desktop issue has now been resolved by voluntary disclosure. As far as the Standing Committee minutes are concerned, there is force in Mr Matheson's submission that these are not relevant to the particular dispute - entry for "survey and inspection" - which was before the District Court and is now before this Court on appeal.

[34] There is force too in the claim of confidentiality for that material. As Mr Matheson said, in time these parties may become commercial opponents in the sense of the strategy which might be undertaken by Vector Gas in dealing with issues of compensation and the like concerning the appellants land. There is no difficulty therefore in concluding that those minutes are not relevant to the current application for entry for "survey and inspection".

[35] A further aspect to disclosure was the reference to the surveyors and their onward transmission to the District Council of a report concerning erosion. That too is outside the ambit of the present issue.

[36] What then is this appeal about? It entirely focuses around whether it has been shown that Vector Gas took "all reasonable steps to negotiate an agreement for entry" and in that regard it is necessary to analyse what has passed between the parties over the past twenty months or so.

[37] There is a suggestion that negotiations concerning Mangapokatea began in the middle of 2007 when the parties were talking principally about Te Rua Taniwha, but there is an email which records what took place at a meeting between the parties on 14 August 2007 which said, "We are kicking off the Locked Gate realignment project" and contains some technical detail as to what was proposed in that regard.

[38] There was then an email from Mr Gibbs recording what had occurred at a meeting on 7 September 2007, in which he raised issues at that meeting concerning their observance of their role as kaitiaki and their obligation to protect the mauri of the land and waahi tapu.

[39] There were obviously two outstanding issues from Te Rua Taniwha the parties wished to discuss in parallel at a meeting the following day, 13 September.

[40] There appears to be at least a fourth meeting presaged in mid-November by an email from Mr Webb to the Gibbs of 8 November, in which he dealt principally with some of the objections the Gibbs Family Trust had raised concerning these issues, being those raised in opposition to this application.

[41] Mr Gibbs then responded on 3 December concerning issues of disclosure saying, "how does Vector propose it should rectify this problem?"

[42] There then seems to have been a lapse in discussions until 19 June 2008 when there was apparently a meeting at the property to discuss the appellants' concerns relating both to Te Rua Taniwha and Mangapokatea.

[43] That was followed by communications in September 2008, which are not in evidence, but which culminated in a letter from Vector Gas' solicitors to the Gibbs' of 30 September 2008, speaking of Vector Gas' frustration that the Gibbs were not committing to negotiating in good faith and warning that Vector Gas "has no other alternative but to invoke all available remedies to protect the integrity" of the pipelines.

[44] The next link in the correspondence appears to be an email from Mr Gibbs to Vector Gas' solicitors of 6 October 2008. There was in the District Court, and may still be, some doubt as to whether that email was actually received by Vector Gas' solicitors but it is unnecessary to resolve that issue. What is important about the letter are the terms on which the Gibbs Family Trust was prepared to advance the matter. Mr Gibbs said that, "We had been trying in good faith to negotiate a positive

outcome with your client" but then went on to reiterate issues of disclosure and the obligation to disclose, similar to those raised in this matter.

[45] One of the most important letters in the sequence, however, is one from Vector Gas to the Gibbs also dated 6 October 2008, in which Vector reiterated the national importance of the pipelines and set out, for the first time in detail, precisely what it was Vector Gas wished to accomplish in terms of entry and inspection. They said:

> 4 Vector is proposing to undertake three streams of Survey Work as follows:
>
> *Survey – Walk over*
>
> 5 Two to three pipeline engineers will be required to walk over the identified contingency open trench route which follows the ridge of the coastal hills inland of the current pipelines route. The engineers will take notes and photographs to ascertain the viability and practicality of the route for construction.
>
> *Survey – Walk over and bore hole survey*
>
> 6 Vector's geotechnical consultants, Coffey Geotechnics, will be required to walk over the two primary route options to take photographs and note the geotechnical features and details required to prepare a report on the preferred realignment route options. In addition to this, bore hole samples may also be required. If so, Vector will require access for a 4WD tractor mounted core sample rig, and a 4WD utility tanker vehicle. A crew of four persons will be required to operate the core sample rig and record results. Water will be required as a lubricant for the bore hole operation and will be supplied from the 4WD utility tanker vehicle. The water will be potable water, containing no additives. The core samples will be up to 100 millimetres in diameter but no additional excavation will be required.
>
> *Survey 3 – Inspection of the cliffs*
>
> 7 A walk over the area of the existing pipeline and the adjacent cliffs will be required to assess the erosion of the cliffs and the possible effects that the existing pipeline may have on the likely failure mode of the cliffs. This would enable Vector to better understand the effect that the pipeline trench may have on future erosion rates as the cliff face regresses to close proximity of the pipeline trench. This work will include a review of the work previously carried out by Dr Jeremy Gibb, of Coastal Management Consultancy Limited. We note that Dr Gibb will not be involved in undertaking this work, or be involved in any further part of the project. This will require Coffey Geotechnics to take earth samples of the cliff by hand, where it is safe and easily accessible, and will require beach access.

[46] Some of those requirements were elaborated on in the following paragraph which read:

> 8. In summary:
>
> (a) When can the Survey Work begin? – Vector's engineers and consultants would be ready to undertake the Survey Work after 10 working days of receiving notice to commence.
>
> (b) How often will Vector require access for the Survey Work? – Vector will require access to your property on a daily basis, between the hours of 8am and 5pm, over a maximum of 10 consecutive working days (five consecutive working days for walk over (including the cliffs inspection) immediately followed by a maximum of five consecutive working days for core sample drilling).
>
> (c) Type of access required – Vector's engineers and consultants will conduct walk over surveys of your property in respect of Surveys 1 and 3 (as outlined above). For Survey 2, access will be required for the 4WD tractor mounted core sample rig and 4WD utility tanker vehicle. For this equipment, Vector will require access to your property off Clifton Road and through existing field gates. This may require stock to be moved.
>
> (d) Equipment – surveying equipment which is capable of being carried by hand, 4WD tractor mounted core sample rig (1.5 tonnes in weight and mounted on low impact rubber tyres) and a 4WD utility tanker vehicle.
>
> (e) Number of persons requiring access – two to three pipeline engineers for Survey 1, and a maximum total of 8 persons for Surveys 2 and 3.
>
> (f) Reinstatement – all bore holes will be lined with a casing and capped off to enable future monitoring or, if future monitoring is not required, the bores will be grouted and capped.

[47] The response from the Gibbs Family Trust's solicitors of 13 October, however, went back to the disclosure issues and, in particular, discovery in an associated piece of litigation between the parties in the Maori Land Court. Subsequent correspondence also reiterated much the same point and both parties accused the others of not co-operating in a good faith negotiation.

[48] What is important, even pivotal, however, in this case is that the parties agree that they have reached an impasse. Mr Pou accepted as much in his submissions on

appeal and, indeed, before Judge Roberts. There is a difference of view between the parties as to who was largely responsible for causing the impasse but, in the Court's view, that is of limited assistance. The parties are at an impasse. There is therefore no realistic chance that they will be able to "negotiate an agreement for entry". It is of no particular assistance to the parties to try to resolve who caused the impasse since, as previously noted, these are parties who will need to be in ongoing negotiations and have an ongoing relationship for a very long time to come.

[49] The issue therefore is whether that course of correspondence demonstrates that Vector Gas has taken "all reasonable steps to negotiate an agreement for entry" in terms of the way in which that phrase is to be construed having regard to the authorities previously discussed.

[50] Vector Gas may be open to a certain measure of criticism for being engaged in discussions with the Gibbs Family Trust for well over a year before it actually put on paper precisely what form of "entry and investigation" it wished to undertake. But, on the other hand, the Gibbs Family Trust is also open to a certain measure of criticism for declining to engage in negotiations over that detail and harking back to the issues they obviously hold of considerable importance to them, concerning the land generally, Te Rua Taniwha in particular, and other issues of disclosure.

[51] In the District Court Judge Roberts held that Vector Gas had taken "all reasonable steps" to negotiate an agreement. As mentioned, that means all steps which, objectively assessed, could be considered reasonable in all the circumstances of this case.

[52] The parties agree the Kapuni pipeline is a matter of national importance. The parties agree it needs realignment at Mangapokatea and other sites. The parties agree the work will become progressively more urgent. The parties also agree there remain outstanding issues between them concerning Te Rua Taniwha but, for the reasons already discussed, this Court takes the view those issues are not relevant to this matter. They are not part of the judgment if for no other reason then that the parties' remedies are contractual.

[53] The outcome, both in the District Court and this Court, may have differed had the parties, following receipt of the Vector Gas letter to Mr and Mrs Gibbs on 6 October 2008, embarked in any meaningful negotiations concerning the terms of entry for survey and inspection. But they did not. The agreed impasse therefore resulted and the conclusion must therefore be that Vector Gas had taken all reasonable steps to negotiate an agreement for entry but that because the parties were – to put it colloquially – largely talking past each other on issues now construed as irrelevant, no agreement to enter was possible.

[54] In those circumstances, it must be held that the Gibbs Family Trust has not shown that Judge Roberts was wrong or erred in law or fact in the conclusions which he reached. Accordingly, the appeal requires to be dismissed.

[55] Under s 111A(4) an order made under the section is required to specify certain listed requirements. As mentioned, Judge Roberts seems to have omitted that aspect of the matter or, at least, not dealt with them in any detail.

[56] In this Court's view, an opportunity should be given to the parties to try to negotiate an agreement for entry without an order of the Court to that end. After all, as mentioned, these are the parties who know the land and know the technical problems of the pipelines best. The Gibbs Family Trust has a deep and abiding interest in ensuring that what it accepts is necessary work on the Kapuni pipeline is done in a way which respects their kaitiaki status and is done with the least intrusion and with no damage to waahi tapu and the other aspects of their status.

[57] What the Court therefore proposes to do is to give the parties an opportunity for 14 days from their receipt of the typescript of this judgment to endeavour to negotiate an agreement for entry. It would be expected that the agreement would include at least the detail of the proposed "entry for survey and inspection" appearing as Schedule 2 to Vector Gas' application to the District Court. That largely mirrors the details in the 6 October 2008 Vector Gas letter but there may be some additional matters to which the parties need to turn their minds.

[58] In addition, the parties should recognise that the second part of what is described in Schedule 2 as "Survey 2" is significantly more intrusive to the Gibbs Family Trust's land than Surveys 1 and 3 and the first part of Survey 2. Surveys 1, 3 and the first part of Survey 2 would empower no more than a limited number of persons walking across or driving across the Gibbs Family Trust land. That can cause no damage to anything the Gibbs Family Trust holds dear.

[59] The second part of Survey 2, if undertaken - and it is not certain from the material that it would be undertaken - involves intrusion into the land by the boring and taking of core samples. It would be expected that any agreement between the parties would deal with any core sampling in a way which respects the Gibbs Family Trust's mauri and kaitiaki status for the land. In particular, it would be expected that any agreement would include paragraph 8(f) of the 6 October letter.

[60] In addition, the draft order submitted by Mr Matheson to the District Court following the delivery of Judge Roberts' decision may also provide a helpful template, particularly in paragraphs 5 and 6.

[61] Some additional conditions, which may well be thought appropriate, follow:

a) Firstly, Vector Gas should give at least two week's notice of its intention to go onto the Gibbs Family Trust's land for the purpose of "survey and inspection", though there may need to be some flexibility about that, given weather conditions.

b) Secondly, the work should predominantly be done during week days, although it is noted that it is suggested in some of the material reviewed that 14 consecutive working days might be required.

c) Thirdly, and importantly, Mr Gibbs or his nominee should be given the opportunity to be present when the survey and inspection visits are undertaken. It is accepted in terms of paragraphs 5 and 6 of the draft order that there would be prior briefing and an identification of waahi tapu and the like but, nonetheless, the route of the proposed

realignment is currently at least no more than very generally described and it would be helpful to both parties to this dispute for Mr Gibbs or his nominee to be able to be present when discussions as to the line of the realignment are being undertaken in order to ensure there are no problems such as occurred at Te Rua Taniwha where a midden was disturbed.

d) Finally - though no doubt Vector Gas would do this as a matter of course - the "entry for survey and inspection" should be undertaken with the least possible interference with the Gibbs Family Trust's farming operations, particularly in relation to such matters as moving stock, closing gates and the like.

e) The parties may also benefit from considering what provisions in the Te Rua Taniwha contract might usefully be included in any agreement for "entry for survey and inspection" at Mangapokatea and the extent to which that agreement could be used as a template.

[62] In formal terms, therefore, the order is that the appeal be dismissed but the parties are to have 14 working days from receipt of the transcript of this judgment to endeavour to negotiate an agreement for "entry for survey and inspection" along the lines suggested. If the parties are unable to reach an agreement on that issue, leave is reserved to revert to the Court to resolve the precise terms on which entry will be permitted.

[63] The indication in terms of costs is that costs should lie where they fall. These are both parties intimately affected and interested in the land. They must have a long and ongoing mutual relationship. They have perhaps been talking past each other to date but with the issues now being clarified, hopefully that difference of opinion will evaporate and, accordingly in my view, this is a case where neither party should receive costs.

[64] [After counsel each took instructions.] By consent the costs of the appeal are to lie where they fall.

.....

HUGH WILLIAMS J.

Copies to:

miharo@rangitauira.co.nz

pou@rangitauira.co.nz

bal.matheson@russellmcveagh.com

daniel.minhinnick@russellmcveagh.com

Judge.Roberts@justice.govt.nz

Sandra.Hopkins@justice.govt.nz