

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2009-404-002292**

BETWEEN OKAHU HAULAGE INCORPORATED  
Plaintiff

AND AUCKLAND CITY COUNCIL  
Defendant

Hearing: 6 August 2009

Appearances: SEK Reeves & Mr Futter for plaintiff  
A M Halloran for defendant

Judgment: 19 November 2009 at 3.00 pm

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**JUDGMENT OF WINKELMANN J**

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*This judgment was delivered by me on 19 November 2009 at 3.00 pm pursuant to  
Rule 11.5 of the High Court Rules.*

*Registrar/ Deputy Registrar*

Simon Reeves, 43 High Street, Auckland  
Auckland City Council Legal Services Group, Private Bag, Auckland

[1] Okahu Haulage Incorporated (Okahu Haulage) has been hauling boats out of the water at Okahu Bay, and cleaning and maintaining them since 1975. Throughout that time it has provided services from an area of land known as the Landing which it uses under a licence. Now the owner of the land, Auckland City Council (the Council), has given notice to Okahu Haulage terminating the licence. Okahu Haulage applies to review the Council's decision on the grounds that the purported termination is unlawful, and that the Council has acted unreasonably and with procedural impropriety in terminating the licence.

[2] In January 1988 the Council became the registered proprietor of the Landing which is located at Okahu Bay, Auckland. Ports of Auckland vested the Landing in the Council for recreation purposes. The Landing consists of several hectares of reclaimed land on the northern side of Tamaki Drive. It was reclaimed around 1940. The land is triangular in shape and provides direct access to the harbour. It contains one of only two launching ramps within the Auckland city area, and is also used for hauling out larger vessels for maintenance. For these reasons the area is in heavy demand by the public.

[3] The Council operates its own haul out and hardstand facility at the Landing. For a fee, any member of the public can have his or her boat hauled out of the water in order to clean and maintain it on the hardstand facility. The nature of Okahu Haulage's operation is that members pay an annual fee, and in return they are able to haul out and undertake the maintenance on their boats at a cost less than that which the public are generally charged.

[4] The Landing has 14 marine related sporting clubs and groups in occupation. The Council maintains a site opposite the Landing, from which staff manage the Council's day to day operations. Okahu Haulage operates from a small area located on a ramp at the Landing, approximately 16 x 12 metres in size. It provides haul out and maintenance facilities to its members using haul out rails and a pulley system.

[5] Prior to August 2003 Okahu Haulage used part of the ramp at the Landing for its haul out services, seemingly on an informal basis, although the precise details of

that were not before me. In October 2002 the Council began negotiations with it in relation to the grant of a formal licence for the use of some of the land. In August 2003 that licence was signed, with an initial term of three years with four subsequent renewal terms of three years each.

[6] The licence granted Okahu Haulage the “Licence Rights”. The “Licence Rights” are defined as follows:

**1.1.1 Licensed use:** the right to carry on the Licensed Use on the licensed Area; and

**1.1.2 Access:** the non-exclusive right to have access to the Licensed Area through those parts of the Property that are necessary to give access to the Licensed Area in order to carry out the Licensed Use.

[7] “Licensed Use” is defined as the following uses by members of the Licensee:

(a) the haulage of pleasure boats over and along the haulage lanes ... ;  
and

(b) the cleaning and maintenance of pleasure boats on those haulage lanes.

[8] As to termination, the licence provides:

**2.2 Termination by the Licensee:** the Licensee may terminate this licence at any time on one year’s notice in writing to the Licensor for any reason. The licence will terminate on the expiry of that notice.

**2.3 Termination for Alternative Use:** In addition to the other provisions of this licence, Council may terminate this Licence on three years’ written notice if the Licensor requires an alternative use, management regime or management practice for the Licensed Area, at the total discretion of the Licensor. The licence will terminate on the expiry of that notice.

**2.4 Termination for Insufficient Use:** In addition to the other provisions of this licence, Council may terminate this Licence on three months’ written notice if it is satisfied that the Licensed Area is not being used or sufficiently used for the Licensed Use, after making such enquires as it thinks fit and giving the Licensee an opportunity of explaining the usage of the Licensed Area. The licence will terminate on the expiry of that notice.

[9] Also of relevance to this application for review are the rights of renewal contained in clause 3:

- 3.1 **Preconditions:** If:
- 3.1.1. **Written Notice:** at least three months before the Termination Date the Licensee gives the Licensor written notice of the Licensee's wish to obtain a renewal of this licence; and
- 3.1.2 **Compliance by Licensee:** The Licensee has complied with all of the Licensee's obligations under this licence:
- 3.1.3 **No Alternative Use:** the Licensor does not require an alternative use, management regime or management practices for the Licensed Area, at the total discretion of the Licensor;

then the Licensor will renew this licence at the Licensee's cost for the Renewal Term beginning on the day following the Termination Date. The renewed licence will be on the same terms as this licence, including this clause, but the Licence Fee may be reviewed in accordance with section 5, but in no case may the Licensee obtain a renewal of this Licence for a period expiring later than the Final Expiry Date.

[10] Mr John O'Brien, a property manager with the Council, provided an affidavit setting out the background to the notice to terminate. He said that when the Council acquired the Landing it was in a generally poor condition. The whole site was in gravel, was difficult to access, and had limited lighting and parking for the public. The Council's filtration system was outdated, and the buildings on site were a "mishmash" containing a variety of users who had different interests in the site. Because the Council recognised that the Landing was a special place, to which the public should have better access, it began a consultation process with users and the public. In December 2005 after this consultation process it approved a concept plan for the Landing, and following that there was further consultation. Okahu Haulage was given an opportunity to participate in the consultation process. The project team eventually agreed on a final design for the Landing. The purposes of the new concept were stated in a document entitled "Update on the development of a concept plan for the Landing". They are:

- To provide facilities and services to assist the community to fully enjoy recreational boating opportunities available;
- To encourage activities that build on the special culture and identity of the area;
- To manage the site to achieve greatest possible utilisation for the benefit of maximum number of people and in doing so, build interest in water-based activities and the marine environment;

- To charge appropriate rentals and user charges for services provided to recover costs and to assist in the management and development of the site;
- To maintain excellent environmental and health and safety standards;
- To allow commercial activities where these; (1) directly assist in the public's enjoyment of the site and surrounding area, (2) are compatible with other uses, (3) comply with Council policies and plans; and
- To manage the site with regard other public open spaces along Tamaki Drive.

[11] The final concept plan involved removal of Okahu Haulage's service operation from the licensed area. Mr O'Brien explained that during the concept plan process the issue of haul technology had been raised. The issue was important for a number of reasons, but primarily because the water depth increases from east to west across the site. Water depth restricts an operator's ability to launch and retrieve boats. The concept plan had designated and restricted the area for the hardstand. He said that given the water depth and the location of the Council's hardstand facility, it was clear to the project team that the best location for any haul out facility included the area used by Okahu Haulage.

[12] As a result, the project team decided that the Council needed to use and manage the licensed area in a different way and should end the licence. In February 2006 Okahu Haulage applied for renewal of the licence, but the Council responded that the renewal was under review and that it would contact Okahu Haulage once it knew its position. By letter dated 22 September 2006 the Council wrote to Okahu Haulage. Included with the letter was a Deed of Renewal and rent review for the period 1 May 2006 through to 30 April 2009, but the Council gave notice pursuant to clause 2.3 of the licence that it invoked the alternate use provisions. It gave three years notice of termination, and confirmed that there would be no renewal at the expiry of the current term (in April 2009). The Council also raised concerns regarding potential environmental hazards associated with the operation.

[13] In its statement of claim, Okahu Haulage pleads that the termination of the licence was unreasonable, but submissions filed after the hearing have clarified this position. Okahu Haulage now relies on three grounds for review: error of law, unreasonableness and procedural impropriety.

### **Is judicial review of the decision to terminate/not review available?**

[14] There is a preliminary question in relation to this proceeding, which is whether the decision to terminate/not to renew the licence is amenable to review. The Council concedes that the decision can be judicially reviewed as the Council is a creature of statute with a clear public function and public duties under the Act. It says, however, that to succeed, Okahu Haulage must be able to show *Wednesbury* type unreasonableness, that is to say, it must show that the Council's decision to terminate was a decision that no reasonable Council could have made. Any greater degree of intensity of review would expand the rights of Okahu Haulage as licensee, and increase the obligations of the Council as lessor.

[15] Counsel referred me to a number of authorities in relation to the availability and scope of the jurisdiction to review the exercise of contractual powers by public bodies. The relevant principles that emerge from those authorities can be shortly stated. Contractual decisions by public bodies may be reviewable on public law grounds: *Webster v Auckland Harbour Board* [1983] NZLR 646 at 650. Judicial review may not be available where the relationship between the public body and the plaintiff is more properly governed by private law: *Schelde Marinebouw v Attorney-General* [2005] NZAR 356. The Courts will not interfere with decisions with a high public policy content except where it is clear that the decision making body has done something extraordinary, perverse, absurd or outrageous: *Wellington City Council v Woolworths NZ (No 2)* [1996] 2 NZLR 537. The procedural obligations for a body performing a public function will vary with context. Context for these purposes includes the nature of the decision being made, the nature of the decision making body and the statutory setting in which the decision is made (*Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 [ 57] – [58]).

[16] The aspects of context of relevance in this case include that the decision was made following public consultation on the use and management of an area of public land. The Council is a local authority with a primarily public function and is principally accountable to the public. The decision was made in the statutory setting of the Local Government Act 2002 which requires local authorities to make

decisions in accordance with ss 76-81 of the Act. All of these considerations favour the existence of a power of judicial review.

[17] On the other side of the balance is that the parties have negotiated a contract which details the nature of the relationship and rights and obligations between them. It is a contract providing only a licence to a private entity to use (not to occupy) a piece of public land. From time to time Councils do enter into commercial arrangements in relation to the use of public land. By allowing the contracting party to challenge the exercise of contractual rights and powers by means of judicial review proceedings, the contracting party is thereby able to side-step if not improve, the contractual bargain that it entered into.

[18] I am by no means convinced that judicial review should be allowed in these circumstances. However, in light of the Council's concession I proceed on the basis that judicial review is available, particularly since no proper argument was directed to this point in light of the concession. That concession does not, in the final analysis, make any difference to the outcome.

#### **First ground of review – error of law**

[19] Under this ground Okahu Haulage puts forward two alternative arguments:

- (a) that the Council erred in assuming a total discretion as to whether a change in use existed, or
- (b) that the Council erred in reading the clauses as though it had a power to decide that a change in user (but not more) satisfied the requirements of clause 2.3.

[20] However the argument is framed, the essential issue is whether the Council had a contractual right to terminate the licence. I am satisfied that it did. Okahu Haulage was licensed to use part of the boat ramp for the hauling out *and* cleaning and maintenance of pleasure boats on the same haulage lane. A use which now only allows for haulage out is a different use. It can be expected that the ramp will still be

used for haulage of boats on occasion. However, cleaning and maintenance of the boats on a ramp is a very particular use. Mr O'Brien is explicit that cleaning and maintenance of boats will no longer occur in the licensed area.

[21] There is a suggestion in Okahu Haulage's submissions that the Council only came up with an explanation which entails a change of use at the hearing of this proceeding. But the Council's termination letter refers to an "alternate use", and Mr O'Brien describes the change of use in his affidavit of 27 May 2009.

[22] There was an alternative error of law advanced. A member of Okahu Haulage has conducted extensive historical research into the status of the reclaimed land. On the basis of that research, Okahu Haulage contends that the land remains subject to the Auckland Harbour Foreshore Grants Act 1875. Section 4 of the Act provides:

It shall not be lawful for the Auckland Harbour Board, or any other person, or any body corporate, to construct or carry out any reclamation works, harbour works, or other works whatsoever on the land hereby authorized to be granted, or to erect any quay wharf jetty or other building thereon, except subject to the following conditions:

(1) That the plans and specifications of such works or buildings be first submitted to and approved by the Governor in Council.

...

[23] In reliance on this provision Okahu Haulage contends that the entire proposed re-development of the Landing is unlawful because it has not been approved as required by this Act.

[24] I have read the historical material Okahu Haulage has accumulated with interest. It has produced a significant amount of information as to the development of the use of the Landing over the 20<sup>th</sup> century. I commend its members for their industry. But the argument in relation to the effect of the Act does not assist Okahu Haulage. If Okahu Haulage is correct that the Council requires an Order in Council before it can commence building on the site, it nevertheless does not require that consent before terminating the licence.



## Unreasonableness

[25] As to the ground of unreasonableness, Okahu Haulage argues that it is unreasonable to act unlawfully. Since I have found the termination falls within the terms of the licence, this argument fails. Alternatively, it is argued that the Council's actions have been unreasonable because the Council breached Okahu Haulage's legitimate expectation that another clause in the licence agreement would be used if the licensed area was required by the Council. In particular, Okahu Haulage says that it had a legitimate expectation that clause 21.2 would be resorted to. Clause 21.2 reads:

**21.2 Change of Licensed Area:** At any time during the Term, the Licensor may:

**21.2.1 Without Determining Licence:** without determining this licence; and

**21.2.2 One Month's Notice:** on first giving the Licensee one month's written notice:

require the Licensee to transfer the Licensee's occupation from the Licensed Area to any other part of the Property which the Licensor reasonably considers suitable for the Licensee's use. The Licensor will use all reasonable endeavours to ensure that this part of the Property is the same size and prominence as the Licensed Area. This licence will then apply to that new location as if it were the Licensed Area. The Licence Fee will not be payable on any days or part days on which the Licensee is unable to trade due to the Licensor's relocation of the Licensed Area. The Licensor will use all reasonable endeavours to relocate the Licensed Area with as little interference to the Licensee's business as possible.

[26] Okahu Haulage does not dispute that the cancellation was permitted by clause 2.3 if the pre-conditions for that cancellation were met. Nor does it dispute that the Council had a discretion as to whether to relocate Okahu Haulage pursuant to clause 21.2. But it says that clause 21.2 was inserted into the deed because Okahu Haulage objected to the possibility that the licence might be terminated under clause 2.3 due to reorganisation of the Landing. Okahu Haulage was told that if the licensed area were to be required, it would be relocated. So while clause 21.2 granted the Council a discretion to relocate Okahu Haulage, through its extra contractual conduct the Council assured Okahu Haulage that the discretion would be favourably exercised. Okahu Haulage said that it proposed to relocate from the sloping ramp to the flat

surface, and to haul boats up on to that surface to clean them. That proposal was rejected in part because it would require boats to be hauled over the public path at the top of the ramp, and would impede public access. But the Council says that it plans to haul boats over the same path.

[27] On a plain reading of clause 21.2, the Council has no obligation to relocate Okahu Haulage. Rather, clause 21.2 creates a right in the Council to relocate Okahu Haulage on one month's notice. Clause 3 is not expressed to be subject to clause 21 so the clauses operate independently of each other.

[28] Okahu Haulage argued that there were pre-contractual representations which in some way qualify the right contained in clause 3. I do not consider this argument any further as there is no evidential basis for it. The evidence relied upon by Okahu Haulage in support of this is only a request from Okahu Haulage following receipt of the termination of the licence. Okahu Haulage asked that if any reorganisation of the Landing were to occur, they be relocated in accordance with clause 21.2 of the licence. This request of course, occurs after formation of the contract. Mr Smith also says that Okahu Haulage requested the inclusion of clause 21.2 when negotiating the licence because of Okahu Haulage's understanding that such a reorganisation might happen. But he does not go so far as to say that it was agreed by the Council that if the licence was terminated for one area, Okahu Haulage would be relocated. Any legitimate expectation must have a reasonable basis. A legitimate expectation cannot be founded on a hope or unsubstantiated belief of the person asserting it: *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 at 127.

### **Third ground of review – procedural impropriety**

[29] Okahu Haulage argues that the Council was motivated in its decision to terminate the licence by a desire to obtain a commercial advantage for its own boat haulage operations. Okahu Haulage bases this on remarks made in correspondence between the Council and Okahu Haulage. The first is contained in an email dated 6 July 2006 from Mr O'Brien to one of the members. In it he says:

It is fair to say that the project team did not respond very favourably to the suggestion that we might allocate an area within the hardstand for the exclusive use of Okahu Haulage. It was concerned about the potential conflict between the two operations, and the rather awkward commercial arrangement whereby members of your society would have access to the hardstand area at a cost that is significantly less than the regular fee.

[30] Mr O'Brien's observation seems entirely sensible. It would be "awkward" if members of Okahu Haulage could utilise the same area as the public, but at a reduced fee. Moreover, what is not referred to by Okahu Haulage is the rest of the content of that email. For example, in the very next paragraph Mr O'Brien continues:

The project team also had concern about the installation of fixed rails and the haulage of boats across an area which, in the concept plan, is dedicated to public walking access. It is considered that this will pose health and safety risk which is unacceptable.

And then further down:

As we discussed at our previous meeting, the cleaning of boats on the sloping ramp is not acceptable to Auckland City because of the risk it poses to the environment, and the perceived risk when viewed by the public.

He concludes:

Auckland City is investing heavily at The Landing to ensure that the area is attractive and safe for public use, and that it operates in a sustainable and environmentally friendly fashion. It is difficult at present to see how the current operation of Okahu Haulage fits with this.

[31] The next piece of correspondence relied upon is in an email from a member of the project team to a member of Okahu Haulage. In that email he summarises the project team's concerns as including "conflict with the services that Auckland City provide".

[32] However, that again is an isolated part of the email. That is the third concern enumerated. The first, second and fourth are as follows:

1. Operation ... on the ramp (sloping surface) exposes Auckland City to environmental risks that are totally unacceptable to the city. (Moving further up the ramp is not an option).
2. Your operation is deemed to provide private benefit (members only) and would be subject to market rate rental rates.

...

4. All operations must comply with Health and Safety and OSH regulations.

[33] Having reviewed the communications relied upon by Okahu Haulage I am satisfied that the Council's decision was not motivated by its desire to obtain commercial advantage for its own commercial operation, but was rather necessary to enable the reorganisation and development of the Landing in accordance with the plan the Council had settled upon.

[34] Procedural fairness imposes variable requirements, dependent on the context. The Council was exercising its contractual rights. In such circumstances it was not obliged to act judicially or to disqualify itself from decision making because of its own interest in the outcome. In this case the Council dealt with Okahu Haulage openly. All the parties knew that the Council wanted to redevelop the Landing. Okahu Haulage had the opportunity to consult with the Council about the proposed redesign. The Council made the decision to terminate the licence on bona fide grounds, after taking into account relevant and appropriate considerations.

[35] Accordingly, this third ground of review also cannot succeed.

[36] For these reasons I am satisfied that Okahu Haulage's judicial review application must fail. The defendant is entitled to costs and disbursements on a 2B basis.

Winkelmann J