IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-7207

BETWEEN	FULLERS BAY OF ISLANDS LIMITED First Applicant
AND	INTERCITY GROUP (NZ) LIMITED Second Applicant
AND	OTEHEI BAY HOLDINGS LIMITED First Respondent
AND	EXPLORE NZ (2004) LIMITED Second Respondent
AND	THE MINISTER OF CONSERVATION Third Respondent

Hearing: 4 December 2009

Counsel: J D McBride and N B Goodger for Applicants
M R Heron and D J Minhinnick for First and Second Respondents
G Houghton for Third Respondent

Judgment: 8 December 2009

JUDGMENT OF HEATH J

This judgment was delivered by me on 8 December 2009 at 2.15pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Bell Gully, PO Box 4199, Auckland
Russell McVeagh, PO Box 8, Auckland
Crown Law, PO Box 2858, Wellington (Attention B H Arthur)
Department of Conservation, Private Bag 68908, Newton, Auckland 1145, (G Houghton)

The application

[1] Fullers Bay of Islands Ltd (Fullers) and Intercity Group (NZ) Limited (Intercity) seek an interim injunction to restrain Otehei Bay Holdings Limited (Otehei) and Explore NZ (2004) Limited (Explore NZ) from preventing access to vessels operated by Fullers to the wharf and other facilities situated at Otehei Bay, on Urupukapuka Island (the Island).

Background

[2] Fullers has been operating scenic boat cruises and ferry services in the Bay of Islands since the 1930s. A number of its advertised cruises stop at the Island, the largest of the islands situated in the Bay of Islands. The Island is a well-known tourist and recreational destination.

[3] Fullers vessels arrive at and depart from the wharf facility at Otehei Bay. Near the wharf is a resort, known as the Zane Grey Resort. The resort is named after an American fisherman and writer who visited the Island in the late 1920s. Otehei is the current owner of the resort facilities.

[4] In June 1979, a *Gazette Notice* was issued proclaiming the Island to be a recreation reserve, for the purposes of the Reserves Act 1977. The land is administered by the Department of Conservation. That part of the Island, on which the resort and its facilities stand, is the subject of a lease in favour of Otehei.

[5] The land comprising the Zane Grey Resort has been leased to private interests for many years. In 1999, Fullers entered into a licence agreement with the then owner of the resort to use its facilities (including the wharf) for a term of nine years, with two (licensee) rights of renewal for three years each. The initial licence fee was $245,000 per annum. That had increased to $300,000 per annum by 2008.

[6] The consideration paid by Fullers represented a bundle of rights contained in the licence, including a right of first refusal to purchase the lease should the licensor

decide to sell. To preserve those rights, Fullers renewed the licence agreement in 2008, when payments were increased to $300,000. While the $300,000 could not be said to represent the fee that Fullers was prepared to pay for landing rights on the Island, I have no doubt that a fee component for such use was factored into the contractual arrangements. Whether, at the time, Fullers was legally obliged to pay the resort owner for the use of the wharf is an issue raised expressly in this proceeding.

[7] At the time of the renewal of the licence in 2008, the licensor was Dew Drop Properties Ltd (Dew Drop). It had obtained a lease for a term of five years from the Minister of Conservation. The relevant lease is dated 1 August 2007.

[8] Subsequently, Dew Drop was placed in receivership. Although Fullers endeavoured to exercise its right of first refusal to acquire the resort, those negotiations failed. Fullers cancelled the licence agreement. The receivers sold the leasehold interest in the land (including the resort structures) to Otehei. The purchase was settled on 1 May 2009, with the lease being formally assigned in favour of Otehei on 3 June 2009.

[9] The sole director of both Otehei and Explore NZ is Mr Goodfellow. His evidence is that he acquired the resort as part of an intention to operate an integrated business, part of which involves the operation of an exclusive business for Otehei's parent company, Explore NZ, to transport passengers to and from the Island.

[10] Although some discussions had taken place previously, things came to a head on 31 August 2009 when Mr Goodfellow wrote to Mr Johns, the Chief Executive of Intercity. Intercity is Fullers' parent company and all management operations for Fullers are undertaken through that entity.

[11] Mr Goodfellow's email to Mr Johns followed discussions involving Fullers' rights of access to the Island. This issue was of concern to Fullers because travel agents, in New Zealand and overseas, advertise, as one of Fullers' services, visits to the Island. The evidence indicates that up to 5000 people have already booked their passages with Fullers, to go to the Island during the course of the summer months.

[12] Mr Goodfellow wrote:

> Hi Malcolm
>
> To give up the rights under our lease and allow seamless access to the leasehold and facilities at Otehei Bay we are going to require a considerable amount more than you indicated at the meeting.
>
> We have come to the same conclusion as offered to you a few months ago that this year you would need to pay a minimum of what you agreed to pay under the landing rights licence in May 2008. Approx $300 000 CPI adjusted. This will need to increase significantly as we embark on the major development programme over the next few years but not worth calculating unless we are currently anywhere close. As discussed, to maintain integrity of product we need complimentary landing times, ie Fullers to land first.
>
> Of note we will be allocating significantly more to our operation.
>
> Plus, as discussed we would need to make infrastructure charges (estimates only) that relate specifically to accommodating your increased pax numbers, this proportioned by relative pax numbers;
>
> $140 000 upgrade to wharf
>
> $150 000 sewage
>
> With the season looming we both need this cleared in the soonest, I look forward to your reply and are happy to get together asap to discuss.
>
> Kind regards
>
> William

[13] Fullers were not prepared to pay the sum demanded for the use of the wharf and recreational facilities. On 28 October 2009, Otehei purported to deny access to both the wharf and the resort facilities to Fullers and its passengers.

[14] With the main part of the tourist season rapidly approaching, Fullers sought interim relief. The application came before Woodhouse J, on 9 November 2009. After hearing from counsel, the Judge made holding orders to enable Fullers to retain access to the wharf and facilities pending full argument on the interim injunction application:

> [5] I make the following orders which are to remain in place pending a full hearing of the applicant's application for an interim injunction:
>
> > a) The respondent and its servants and agents will not deny the applicant's reasonable access for their vessels to the wharf at Otehei Bay.

b) The respondent and its servants and agents will not deny passengers on the applicant's vessels access onto the wharf and passage across the land that is leased by the respondent on Urupukapuka Island.

[6] These orders are subject to the following:

a) The applicant is to pay the respondent a sum of $3,000 a month. That is without prejudice to the position of any of the parties in any respect. It is also a sum that may be required to be refunded by the respondent subject to the further orders of this Court.

b) The respondent has advised that access for the applicant's vessels to the wharf between the hours of 11:00 a.m. – 12:30 p.m. and 3:30 p.m. – 5:00 p.m. may cause difficulties. Between those hours the parties are to co-operate and make reasonable endeavours to avoid undue overloading with passenger arrivals or departures.

c) Access to the wharf for the applicants is also subject to any temporary restrictions that may have to be imposed for repairs, or for safety measures, as may be directed by any regulatory authority.

d) The parties are to mediate the issues between them without delay and to co-operate fully in that regard.

[15] I heard the application for interim relief, on a contested basis, on 4 December 2009. I reserved my judgment. I express my gratitude to counsel for the quality of their submissions and the supporting materials. Notwithstanding that, I do not propose to outline in any detail the submissions made. I do so to facilitate a prompt disposition of the application.

Interim injunction applications

[16] The approach to be taken on an application for an interim injunction is well settled. A framework for analysis was articulated by the Court of Appeal in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC and CA).

[17] Delivering the judgment of the Court of Appeal, Cooke J indicated that whether there was a serious question to be tried and the balance of convenience were two broad questions that provided an acceptable framework for determining an application for an interim injunction. Those two heads are not exhaustive. In each case, it is necessary for a Judge to stand back and determine where the overall

interests of justice lie. In doing so, the Judge may take account of any other relevant considerations. See *Klissers Farmhouse Bakeries Ltd*, at 142.

The issues

[18] On the question whether there is a serious issue to be tried, three issues arise:

a) The ability of Fullers to use the wharf for embarkation and disembarkation of vessels taking passengers to the Island.

b) Assuming the wharf may be used, whether members of the public, once on the Island, are entitled to walk over the leased land to access other parts of the Island.

c) Whether any restraint should be placed on promotional brochures issued by Explore NZ, describing visits to Otehei Bay as an "exclusive private Island", or words to that effect.

[19] The first two issues require determination of whether Otehei, through its acquisition of assets from the receivers of Dew Drop, has acquired ownership of the wharf and exclusive possession of the leased land. Otehei's position is that it is entitled to prevent others from using the wharf for commercial purposes and to determine whether any particular person should be allowed onto land of which it has exclusive possession, through a lease.

[20] In contrast, Fullers' position is that there are public rights to use private wharves and that the underlying status of the leased land as a "recreational reserve" entitles members of the public, as of right, to use that land for recreational purposes.

[21] On the brochure issue, Mr Heron, for Otehei and Explore NZ, has undertaken to the Court that the brochures will be amended to remove the words "exclusive" and "private". That will be done by stickers in respect of those brochures currently available for public distribution (I am informed this was a short run of brochures) and future runs of the brochures will omit those words.

[22] In those circumstances, no order is required against Explore NZ in respect of the brochure issue, though leave to apply is reserved should any unexpected issues arise that require an order to be made.

Are there serious issues to be tried?

Introductory comments

[23] For commercial purposes, Fullers must gain access to the wharf facility to complete, satisfactorily, their contracts of carriage with passengers. While it might be feasible, in practical terms, to moor a vessel offshore and to use a tender to transport passengers from the vessel to part of the Island not subject to the lease, competitively Fullers would be at a considerable disadvantage.

[24] The commercial imperatives and applicable legal principles are divorced in nature. Legally, there are two discrete issues. The first is whether Fullers can access the wharf and the second is whether the passengers, having arrived at the wharf, are entitled to go over leased land, to access remaining parts of the Island.

(a) The wharf issue

[25] *Hume v Auckland Regional Council* [2002] 3 NZLR 363 (CA) held that, as a result of the application of ss 6(d), 12 and 122(5) of the Resource Management Act 1991, a person who had obtained a coastal permit (under s 12 of that Act) to erect a jetty obtained a right of occupation of the structure that did not encompass an ability to exclude the public from lawful use of the coastal marine area. Tipping J, delivering the judgment of the Court of Appeal, said:

> [29] ... The public may use the Hume's jetty in a reasonable manner for the purpose of gaining access to, from and along those parts of the coastal marine area which are adjacent to the jetty. In doing so they may not unreasonably impede the Humes' access to and use of the jetty. *The legislation is designed on the basis that public and private access will reasonably and peacefully coexist.* The price which the Humes are required by the Act to pay for the right to construct and use their jetty is that it be available for public use on the basis described. (my emphasis)

[26] Mr Heron accepted that I am bound by *Hume.* But, he contended that *Hume* could be distinguished on the grounds that the Court of Appeal did not intend to extend the same rights of user to commercial competitors. He referred me to another part of the *Hume* judgment, in which Tipping J said:

> [27] The activity of construction of a jetty must by necessary implication exclude others to the necessary extent. The activity of occupying and using the jetty does not do so, except to a very limited spatial and temporal extent. It is the occupation dimension which is relevant in this case and in any event, as noted earlier, the Humes cannot gain the advantage of avoiding the clear implication of s 108(2)(h) by not having a s 12(2) permit and relying on the dubious argument, based on implication, that they have one by dint of their s 12(1) permit. We therefore accept Mr Asher's submission that as the permit does not expressly provide otherwise and as there is no reasonable implication to the contrary, the Courts below rightly held that the public were entitled to use the Humes' jetty for access purposes. We note, however, that public use must not be such that it unreasonably impedes the Humes' use of the jetty to gain access to their property.

[27] I accept Fullers' contention that the starting point for analysis is the terms of the coastal permit. The relevant permit was granted to Zane Grey Resort Ltd (a predecessor in title to Otehei's leasehold interest) on 27 October 1992. The permit expires on 27 October 2017. The activity permitted was the removal of an existing jetty and replacement of it with a new jetty at Otehei Bay.

[28] The relevant conditions of the coastal permit state:

> ...
>
> 2. The holder of this consent shall maintain the facilities within the permit area in good order and repair and not alter or add to the facilities without obtaining the approval of the Council.
>
> ...
>
> 5. The consent holder shall pay an administration charge fixed by the Northland Regional Council for administration, monitoring and supervision of this consent and for carrying out of the Council's Resource Management function.
>
> ...
>
> 10. *The holder of this consent permitting the public at all reasonable times to use the facilities established within the permit area either free of charge, or upon payment of such fee or charge as the Council may from time to time prescribe.*
>
> .... (my emphasis)

[29] Mr McBride, for Fullers, also referred me to the first instance judgment of Potter J in *Hume v Auckland Regional Council* (High Court, Auckland, AP 52-SW/01, 20 August 2001) in which the Judge explained the distinctions between proprietary rights and rights of user in more detail than did the Court of Appeal:

> [27] ... all members of the public have the right to use the coastal marine area. A coastal permit granted to authorise the erection of a jetty, imposes restrictions on the use and enjoyment of the coastal marine area. If the resource authority taking into account all relevant considerations as detailed in the Act, considers that the restriction is justifiable then the permit holder will be authorised to invade and occupy that part of the coastal marine area necessary to permit the structure to be erected and maintained. The coastal marine area does not include structures (it means the foreshore, seabed and coastal water and the airspace above the water), so the structure itself remains the property of the permit holders. But property in the structure does not carry any other exclusivity, for the permit holders have no rights in the coastal marine area other than rights specifically granted by the permit. They may use the jetty structure, not because they own it, but because along with all other members of the public they have the right to use the coastal marine area in which the jetty is constructed. And the right to use the coastal marine area where the jetty is constructed applies equally to all members of the public.
>
> [28] The right to erect a jetty and to occupy part of the coastal marine area in so doing, is a privilege conferred on the permit holders by the permit; it is a grant out of the Crown's ownership of the coastal marine area which it holds on behalf of all members of the public, and is limited by the express terms of the grant.

[30] Condition 10 of the coastal permit plainly envisages that members of the public have the right to use "the facilities established within the permit area". Such use may be free or on payment of any fee or charge prescribed by the Northland Regional Council. While the term "facilities established within the permit area" is not defined, the wharf is the only structure within the coastal marine area with which the coastal permit deals.

[31] Mr Heron submitted that Condition 10 did not extend to a company, which could not be considered as a member of "the public". However, at least for interim injunction purposes, it is seriously arguable that the phrase used in the coastal permit was intended to encompass companies that operate vessels transporting members of the public to the Island.

[32] Mr Heron's second point is that, since the wharf was erected in 1992, it has been regarded as an asset owned by the lessee. He argues that each purchaser has acquired an interest in the wharf in good faith and for valuable consideration. Therefore, Mr Heron contends that Otehei has the right to exclude commercial competitors from the wharf.

[33] I need not decide whether Otehei is right in contending that the wharf is within its private ownership. That is because, even if the wharf were privately owned, it is seriously arguable that a commercial concern, transporting passengers to and from Otehei Bay, has rights of user, in respect of the wharf, in the same way as any other member of the public.

[34] In my view, there is nothing in the Court of Appeal's judgment in *Hume* that points to an ability to exclude a commercial competitor from using a wharf structure, at least to the extent as to render an argument to the contrary incapable of serious argument. The protection for the "owner" lies in the need for the owners' own rights of user not to be unreasonable impeded by others. I refer to paras [27] and [29] of *Hume*, set out at paras [26] and [25] respectively, above.

[35] Accordingly, for the purposes of this hearing, I hold that Fullers has a seriously arguable claim to use of the wharf for its own commercial purposes.

(b) The leasehold land issue

[36] The classification of land as a reserve, for public use, has a long tradition in New Zealand. The history of the various Reserve Acts was explored in my judgment in *Napier Public Health Action Group Inc v Minister of Conservation* [2007] 3 NZLR 559 (HC), at paras [55]-[71]; see, in particular, the classification processes discussed at paras [66]-[71]. I do not repeat what was said in that judgment. My comments, in that case, do no more than to provide background for the issues I now address.

[37] From Otehei's point of view, the starting point for analysis is the lease of 1 October 2006, as assigned from Dew Drop to Otehei Bay on 3 June 2009. Mr McBride referred me to cl 3.3 of the Deed of Assignment which provides:

> **3 Assigneee's Covenant with Grantor**
>
> The Assignee covenants with the Grantor that the Assignee will:
>
> ...
>
> 3.3 comply where relevant with the Conservation Act 1987, the Reserves Act 1977 and any other statute, ordinance, regulation, bylaw or other enactment affecting or relating to the Lease.

The term "Grantor" refers to the Minister of Conservation, as original lessor.

[38] While Mr Heron relies on the right to exclusive possession granted by the original lease, Mr McBride submits that Otehei's promise "to comply where relevant" with the Reserves Act 1977 indicates that the lease must be read subject to rights contained in the 1977 Act.

[39] Contrary to Mr Heron's submission, the lease does not, in fact, grant a right of exclusive possession of the demised land. While Mr Heron submitted that the lease, by its terms, conferred exclusive possession, that submission is based on an inference of that right from various terms set out in the lease document. Mr Heron submitted that authority for the proposition that an intention to confer exclusive possession may be ascertained from the general terms of the lease could be found in *Fatac Ltd (in liquidation) v Commissioner of Inland Revenue* [2002] 3 NZLR 648 (CA) and *New Zealand Fish and Game Council v Attorney-General* (2009) 10 NZCPR 351 (HC).

[40] In *Fish and Game*, Simon France J declined to make a declaration to the effect that farmers holding pastoral leases under the Land Act 1948 did not have "exclusive possession" of the land. In reaching that conclusion, the Judge prefaced his decision with the following general observation:

> [1] The law generally provides that people who occupy property pursuant to a lease enjoy "exclusive possession". That means that they can prevent people from coming on to the property. A landlord will have a right to

inspect and repair, but is otherwise equally excluded unless the lease specifically allows greater or different access.

[41] Mr Heron sought to support his contention by reference to the term "Lease" as defined in s 2(1) of the Reserves Act 1977. The term is defined as follows:

> **Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> Lease, in relation to a reserve vested in the Crown,—
>
> (a) Means—
>
> (i) A grant of an interest in land that—
>
> (A) Gives exclusive possession of the land; and
>
> (B) Makes provision for any activity on the land that the lessee is permitted to carry out:
>
> (ii) Any document purporting to be a lease (whether or not the document gives the lessee exclusive possession of the land concerned) and issued under any enactment passed before the commencement of section 2 of the Reserves Amendment Act 1996:
>
> (iii) Any document purporting to be a lease (whether or not the document gives the lessee exclusive possession of the land concerned) and issued under this Act before the commencement of the said section 2; but
>
> (b) Does not include a licence referred to in paragraph (b)(ii) of the definition of the term "licence";—
>
> and lessee has a corresponding meaning:

[42] Mr Heron relied on s 59A of the Reserves Act. That provision deals (generally) with the ability of the Crown to grant concessions on reserve land. However, s 54 is the specific provision that deals with the Crown's ability to grant or lease over a recreation reserve. An administering body, with the prior consent of the Minister, may grant a lease in respect of a recreation reserve "to the extent necessary to give effect to the principles set out in s 17 of the Reserves Act".

[43] Section 17 is the provision on which Fullers rely for access to the leasehold land. Section 17(1) and (2) provides:

17 Recreation reserves

(1) It is hereby declared that *the appropriate provisions of this Act shall have effect, in relation to reserves classified as recreation reserves, for the purpose of providing areas for the recreation and sporting activities and the physical welfare and enjoyment of the public, and for the protection of the natural environment and beauty of the countryside*, with emphasis on the retention of open spaces and on outdoor recreational activities, including recreational tracks in the countryside.

(2) It is hereby further declared that, having regard to the general purposes specified in subsection (1) of this section, every recreation reserve shall be so administered under the appropriate provisions of this Act that—

> (a) *The public shall have freedom of entry and access to the reserve, subject to the specific powers conferred on the administering body by sections 53 and 54 of this Act*, to any bylaws under this Act applying to the reserve, and to such conditions and restrictions as the administering body considers to be necessary for the protection and general well-being of the reserve and for the protection and control of the public using it:
>
> (b) Where scenic, historic, archaeological, biological, geological, or other scientific features or indigenous flora or fauna or wildlife are present on the reserve, those features or that flora or fauna or wildlife shall be managed and protected to the extent compatible with the principal or primary purpose of the reserve:
>
> Provided that nothing in this subsection shall authorise the doing of anything with respect to fauna that would contravene any provision of the Wildlife Act 1953 or any regulations or Proclamation or notification under that Act, or the doing of anything with respect to archaeological features in any reserve that would contravene any provision of the Historic Places Act 1993:
>
> (c) Those qualities of the reserve which contribute to the pleasantness, harmony, and cohesion of the natural environment and to the better use and enjoyment of the reserve shall be conserved:
>
> (d) To the extent compatible with the principal or primary purpose of the reserve, its value as a soil, water, and forest conservation area shall be maintained. (my emphasis)

[44] Section 17(1) makes it clear that the purpose of a recreation reserve is to provide for protection of the natural environment with a view to its use and enjoyment by members of the public. For that purpose, s 17(2) provides that members of the public have freedom of entry and access to the reserve, subject only (for present purposes) to specific powers to lease conferred by s 54 of the Act.

[45] Save for powers to lease that are restricted to voluntary organisations, s 54 permits leasing in only the following situations:

> **54 Leasing powers in respect of recreation reserves (except farming, grazing, or afforestation leases)**
>
> (1) With the prior consent of the Minister, the administering body, in the case of a recreation reserve that is vested in the administering body, may from time to time, in the exercise of its functions under section 40 of this Act, … may from time to time, to the extent necessary to give effect to the principles set out in section 17 of this Act,—
>
> > (a) Lease to any person, ... (whether incorporated or not) any area set apart under section 53(1)(h) of this Act for baths, a camping ground, a parking or mooring place, or other facilities for public recreation or enjoyment. The lease—
> >
> > > (i) May require the lessee to construct, develop, control, and manage the baths, camping ground, parking or mooring place, or other facilities for public recreation or enjoyment, or may require the lessee to control and manage those provided by the administering body; and
> > >
> > > (ii) Shall be subject to the further provisions set out in Schedule 1 to this Act relating to leases of recreation reserves issued pursuant to this paragraph:
>
> ...
>
> > (d) Grant leases or licences for the carrying on of any trade, business, or occupation on any specified site within the reserve, subject to the provisions set out in Schedule 1 to this Act relating to leases or licences of recreation reserves issued pursuant to this paragraph:
>
> Provided that the trade, business, or occupation must be necessary to enable the public to obtain the benefit and enjoyment of the reserve or for the convenience of persons using the reserve:
>
> Provided also that the prior consent of the Minister shall not be required to a lease or licence under this paragraph where the trade, business, or occupation is to be carried on in the reserve only temporarily and the term of the lease or licence does not exceed 6 consecutive days.
>
> ....

See also the terms on which recreation reserves may be leased, set out in the First Schedule to the Reserves Act 1977. There is no suggestion, in any of those terms, that public's right to use are compromised in any way.

[46] Having regard to the purposes of leases of recreation reserves, other than for the purpose of farming, grazing or afforestation, and the underlying purpose of s 17 (public access to and enjoyment of recreation reserves), I am satisfied it is seriously arguable that any person who disembarks from a vessel operated by Fullers at the Otehei Bay wharf is entitled to use the leased land for recreation purposes. That includes the ability to walk over the land to gain access (for example) to the Department of Conservation walkways.

[47] It is true that there is some inconsistency between the definition of "Lease" in s 2(1) of the Act and the specific purposes from which a lease of a recreation reserve may be granted under s 54. For present purposes it is sufficient to say that the argument that s 54 provides a code for recreation reserves is seriously arguable.

[48] The third cause of action seeks judicial review of the decision to renew the lease on the grounds that the procedures mandated by Part 3 of the Conservation Act 1987 were not carried out. In view of my finding as to the existence of a serious question on the point raised under s 17 of the Reserves Act, it is unnecessary for me to express any view on this topic.

(c) Balance of convenience/interests of justice

[49] Having held that there are serious questions to be tried in respect of both use of the wharf and access over the leasehold land, the next question is whether, in the interests of justice, an injunction should be granted; and, if so, on what terms.

[50] I express the question in that way as, unusually, there are elements of public interest at play in the present case which may override the private interests of one or other of the protagonists, in balancing relevant considerations to determine whether an injunction should issue. In that sense, the customary balance of convenience exercise might not, of itself, add much to the analysis.

[51] The first question is whether, as between Fullers and Otehei/Explore NZ, damages would be an adequate remedy for Fullers. The other side of the same coin is whether, if an injunction were to issue, Otehei would be protected by the

undertaking as to damages given by Fullers and Intercity. The reality is that the parties are clearly able to meet any damages that might be ordered.

[52] In monetary terms, if an interim injunction were declined but Fullers was successful substantively, it would have a claim for loss of profits against Otehei in respect of any period during which it would have been excluded from landing passengers at the wharf at Otehei Bay. Similarly, if the effective monopoly that Mr Goodfellow believed he had obtained for the joint interests of Otehei and Explore NZ were (at least temporarily) nullified by the grant of an interim injunction, those two companies would have the ability to claim damages against Fullers for any loss of profits they may have suffered through an inability to exercise a monopoly right to transport people to and from the Island. The ability of each party to pay any damages ordered renders this point neutral.

[53] It is likely that Fullers would be more greatly affected than Otehei/Explore NZ. Fullers has already entered into contracts to transport about 5000 passengers to visit the Island over the summer months, with approximately 75% of those passengers coming from overseas. There will be significant disruption to Fullers' business, in making alternative arrangements (to preserve its own goodwill) for those passengers to be carried by a competitor. Difficulties may also be caused to Fullers' own brand if existing arrangements, made through travel agents, were to fail.

[54] If an injunction were to issue but Otehei was successful substantively, it would lose its immediate right to charge for use of the wharf, other than on the basis ordered by Woodhouse J. That order requires $3000 per month to be paid into a solicitor's trust account until final order of the Court or agreement of the parties. While Fullers contend that fee is reasonable and consistent with market rates for wharf usage in the Bay of Islands generally, the amount of the licence fee paid to Dew Drop before its insolvency suggests that landing rights might have represented a material proportion of the fee.

[55] There are two public interests that are relevant. The first involves the ability of passengers to travel to the Island and make use of recreation facilities, through

carriers of their choice. The second involves the possibility that, without an injunction, Explore NZ (which does not have rights as a lessee of the land) would receive preferential treatment from Otehei, in the form of an effective monopoly over the summer period.

[56] Balancing those factors as best I can, I find that the interests of justice require an interim injunction to issue so that Fullers can continue its existing business over the main part of the tourist season, on terms that will provide adequate compensation to Otehei if it were to be found to have taken a correct legal position, on proper analysis, after a substantive hearing. The duration of an interim injunction must take account of the need to provide an incentive for all parties to have substantive issues resolved promptly. Save for the judicial review issue, all questions are capable of resolution promptly through arbitration, should the parties co-operate.

[57] In my view, any money paid for the notional landing rights, pending resolution of the substantive proceeding, should be paid directly to Otehei rather than into a trust account. Otehei is able to repay those moneys, with any interest that may be ordered, if its claims to ownership of the wharf and exclusive possession of the leased land were ultimately upheld.

Interim orders

[58] I discharge the orders made by Woodhouse J on 9 November 2009 and substitute the following orders in their place:

a) Otehei, its officers, employees, agents or assigns, shall not deny Fullers reasonable access for their vessels to transport passengers to and from the Island, by using the wharf at Otehei Bay.

b) Otehei, its officers, employees, agents or assigns, shall not deny access (for recreational purposes) across the land leased by it from the Minister of Conservation to passengers and employees of Fullers disembarking from vessels operated by Fullers at the wharf at Otehei Bay.

c) All moneys paid into a solicitor's trust account pursuant to Woodhouse J's orders of 9 November 2009 together with $5000 per month, to be paid on the 20th day of the months of December 2009, January 2010, February 2010, March 2010 and April 2010 shall be paid to Otehei for landing rights at the wharf.

d) The parties shall co-operate to establish timetabling arrangements for the purpose of allowing commercial vessels operated by Fullers, Explore NZ and any other commercial operator to use the wharf to land and uplift passengers safely.

e) Leave to apply on 24 hours notice is reserved to discharge or vary any of the orders made, if there were a material change of circumstances. Such leave also applies to any issues arising out of the undertakings given in respect of the promotional brochure: see paras [21] and [22] above.

[59] The injunction has been issued against Otehei because it is the entity that claims ownership of the wharf and leases the land from the Minister of Conservation. Explore NZ has no right to prevent Fullers from accessing either the wharf or the leased land. However, out of an abundance of caution, I have included any "assigns" under the umbrella of those prohibited from denying access to Fullers in terms of the orders.

[60] Any passengers or employees of Fullers accessing the leased land are only entitled to do so for recreation purposes, as is made clear by the provisions of the Reserves Act 1977.

[61] I have made the orders for payment of moneys to recognise the value of landing rights to Fullers and the need to have some adequate protection for Otehei in the event that it is ultimately successful in claiming a right to prevent Fullers from using the wharf and an ability to trespass such people as it thinks fit from the leased land. The amount (in the context of the evidence about usual landing charges in the Bay of Islands) incorporates a premium for use of the wharf over the summer months

and recognises that additional maintenance costs may fall on Otehei due to the number of vessels using the wharf.

[62] The order for co-operation in relation to timetabling and scheduling issues is made at the request of the parties. I am assured that skippers operating vessels will be able to make arrangements for the safe conduct of the vessels. Access to the wharf will also be subject to any temporary restrictions through the need to repair any part of the wharf or to comply with safety requirements of the relevant regulatory authority.

[63] My orders shall enure until 5pm on 19 May 2010, unless sooner extended by the Court. That period should allow the parties ample time to co-operate to arrange a prompt hearing of the issues in dispute, either before an arbitrator or the Court. It will also enable commercial activities to be undertaken throughout the main tourist season.

[64] The proceeding is adjourned for a case management conference before a Judge on the first available date after 1 February 2010. The Registrar shall fix the date and time of the conference. Memoranda shall be exchanged and filed contemporaneously, not less than three working days prior to the conference, to address timetabling issues for substantive resolution of the proceeding.

Costs

[65] Fullers are entitled to costs on the interim injunction application. One set of costs is ordered in favour of Fullers against Otehei and Explore NZ (jointly) on a 3C basis, together with reasonable disbursements. Both costs and disbursements are to be fixed by the Registrar. I certify for second counsel.

[66] No order is made in respect of any costs incurred by the Minister of Conservation.

_____

P R Heath J

Delivered at 2.15pm on 8 December 2009