

**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: 18 December 2009

Counsel: J D McBride for Applicants
D J Minhinnick for First and Second Respondents
No appearance by or on behalf of Third Respondent

Judgment: 18 December 2009

(ORAL) JUDGMENT (NO. 2) OF HEATH J

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[1] On 4 December 2009, I heard an application for an interim injunction brought by Fullers Bay of Islands Ltd and Intercity Group (NZ) Ltd to restrain Otehei Bay Holdings Ltd and Explore NZ (2004) Ltd, from preventing access to vessels, operated by Fullers, to the wharf and other facilities situated at Otehei Bay, on Urupukapuka Island. In a reserved judgment given on 8 December 2009, I made interim orders.

[2] One of the issues on which interim relief had been sought was not subject to those orders because of an undertaking that had been given to me during the course of the hearing. The question related to promotional brochures. It was whether any restraint should be placed on dissemination of promotional material issued by Explore NZ which described visits to Otehei Bay as an “exclusive private Island”, or words to that effect. That issue was resolved in this way:

[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.

[3] In my formal orders, I reserved leave to apply in the event that any unexpected issues arose.

[4] On 11 December 2009, counsel for Fullers filed a memorandum complaining that the undertaking had not been complied with. The concern related to the existence of promotional brochures containing the offending information which had been located both at Explore NZ’s retail sales office in Paihia and at the I-Site visitor information centre in that town. Those, of course, are two places at which members of the public are most likely to obtain promotional information relating to visits to Urupukapuka Island.

[5] Discussions ensued between solicitors for the parties and affidavits were exchanged. In a draft affidavit provided on behalf of Mr Goodfellow, the director of

Otehei and Explore NZ, he said that although an undertaking had been given to the Court, on reflection the companies decided the best way to address concerns was to replace the old brochures with new ones not including the offending words. Mr Goodfellow's draft affidavit advises that new brochures have been printed and were delivered to Explore NZ's offices on 16 December 2009 and all of the old brochures had been removed and replaced with amended brochures from all Explore NZ centres and I-Site visitor centres.

[6] Mr Minhinnick advises that Mr Goodfellow is presently in Australia and has not been able to swear the affidavit but he confirms that I can act on it, as if sworn. I do so.

[7] I am concerned at what is plainly a flagrant breach of an undertaking given to the Court. Mr Goodfellow well knew that no injunction had been sought because of the undertaking given in the terms recorded in my judgment. It was not for him (or other officers of Otehei and Explore NZ) to determine that an alternative process was appropriate, without having first sought to be released from the undertaking given to the Court. Any such application would have been made on notice to Fullers, who could have then sought injunctive relief in its original form.

[8] Instead, for what I can only infer were commercial advantages, a decision was taken to keep promotional brochures unamended at Explore NZ's office at Paihia and at the I-Site information centre in that town.

[9] Despite what I consider are appropriate submissions as to the need to take reasonable steps to put stickers over the offending words in brochures disseminated around the country, it would not have been any hardship whatsoever for someone from Explore NZ to walk around their own office and to put stickers over offending words on the relevant brochures. Similarly, it would have been easy to undertake the same task at an I-Site visitor centre or other place at which such promotional material is readily available to members of the public.

[10] In my view, the stance taken by Explore NZ was deliberate and cannot be countenanced by the Court.

[11] I propose to make an interim injunction, in place of the undertaking, as I have no confidence that Mr Goodfellow will ensure any undertaking is honoured in the future.

[12] I make orders in the following terms:

- a) Otehei and Explore NZ shall take all reasonable steps to remove the offending words by the use of stickers or to replace the existing brochures with new brochures which do not include the offending words. Such steps shall be taken immediately.
- b) An affidavit setting out the steps taken shall be filed and served by midday on 22 December 2009.
- c) Leave to apply is reserved, should any issues arise which Fullers wish to raise with the Court. After today, any application of that type should go before a Duty Judge.

[13] In relation to the brochures currently in the I-Site information centre at Paihia and the Explore NZ office at Paihia, they shall be either replaced by new brochures or stickers placed over the offending words, by 5pm today. If that order were not complied with, I direct that all promotional brochures referring to Explore NZ's trips to Urupukapuka Island shall be removed from public view in those locations immediately and not restored until the order has been complied with.

[14] The flagrant breach of the undertaking requires sanction. I order that Otehei and Explore NZ, jointly and severally, meet the indemnity costs of Fullers incurred from the time of its first memorandum of 11 December 2009 up to and including today's hearing. Leave to apply is reserved, in case there are any issues over quantum.

[15] I add one further comment, when I speak of reasonable steps I have in mind the need for Otehei and Explore NZ to take active steps to comply with the order, in respect of all major venues at which promotional brochures of this type can be

located. I accept that there will be locations around the country which are difficult to identify and, if any of those remain, I would take a sympathetic view to an inability to comply with the order in respect of those.

P R Heath J