

**IN THE DISTRICT COURT
AT AUCKLAND**

CIV-2011-404-002497

IN THE MATTER OF of the Local Government Act 2002

AND

IN THE MATTER OF an application for an injunction under
section 162 of the Act

BETWEEN AUCKLAND COUNCIL
Applicant

AND THE OCCUPIERS OF AOTEA SQUARE
AUCKLAND CENTRAL being the
Occupy Auckland Group including but not
limited to Andrew Hendrie and Penelope
Mary Bright; and others
Respondents

Hearing: 29 November 2011

Appearances: Mr R S Burns and Ms Efwerson for the applicants
Ms P M Bright representing herself
Mr Buckingham for the other respondents

Judgment: 29 November 2011

JUDGMENT OF JUDGE D M WILSON QC
**[Declining interim injunction and directing hearing of the application for permanent
injunction]**

[1] This is an application for an injunction under section 162 of the Local Government Act 2002 in which the Auckland Council seeks an injunction that the occupiers of Aotea Square since 15 October 2011 remove tents and other items from the Square and thus make it available for the general public to use.

[2] The application is opposed.

[3] When first filed, on 28 November 2011, the application sought an ex parte order, that is, one without giving notice to the respondents, for an interim injunction restraining the respondents from committing a breach of a bylaw.

[4] I directed service of the application and affidavit in support of the respondents in terms of paragraph 4 of the proposed draft order. I am informed that service took place that same afternoon.

[5] When the matter was called on the morning of 29 November 2011 Mr Buckingham appeared as counsel for the respondents apart from Ms Bright and sought an adjournment of the application to enable full consideration and the taking of instructions. Accordingly the argument before me on 29 November proceeded on a “Pickwick” basis but with Mr Buckingham in particular had a clear disadvantage in obtaining instructions given that he received the documentation at 10pm with the matter being called the following morning at 10am.

Legal principles

[6] An interlocutory application can be granted following a two-stage approach:

- (i) whether there was a serious question to be tried in the proceeding; and
- (ii) where balance of convenience lay¹.

[7] Those two stages are not exhaustive because in every case the Judge has to determine where the overall justice of the case lies².

[8] The applicant has given an undertaking as to damages.

[9] Because of the shortness of time no evidence as such was presented by the respondents although Ms Bright made detailed submissions. Mr Burns submitted that having regard to the costs arising from the occupation³ and the interference

¹ *American Cyanamide v Ethicon Limited* [1975] AC 396.

² *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited*.

³ Detailed in paragraph 116 of the affidavit of N L Verdouw.

with the rights of other citizens of Auckland City to use the Aotea Square area that the balance of convenience favoured a granting of an interim injunction.

Name of respondents

[10] The fact that the Auckland Council is unable to identify all of the respondents does not create any legal problem. In this particular case, the description used is sufficient to identify those who are included amongst the respondents and those who are not, particularly, where at least, one alleged infringer can be named (in this case, two persons are named)⁴. My conclusion in this respect is supported by confirmation from a full court of respondents this morning that they had received notice of the application. Accordingly I give directions as to service in the terms sought in the interlocutory application dated 28 November 2011, namely,

- (i) that documents relating to this matter can be served upon the respondents by any of one personal service;
- (ii) affix any copy of the document to the fence surrounding the camp at the main entrance to the camp;
- (iii) by reading the terms of the document to the Occupy Auckland general assembly on one occasion;
- (iv) by posting a copy of the document on the website www.occupyauckland.org and on the Auckland Occupy Face book page.

[11] I turn to consider the balance of convenience. On the one hand the affidavit evidence shows damage both financial and intangible caused by the occupation. The applicant submits that it is likely that the cost could not be recovered from the respondents. Further, it is submitted that the inconvenience to other members of the public can only be remedied by removal of the camp site.

⁴ *Brash v Doe* High Court Wellington CIV-2006-485-002605, 16 November 2006, *Tony Blain Proprietary Limited v Splain* [1993] 3 NZLR 185, and *Bloomsbury Publishing Group Limited v News Group Newspapers Limited* [2003] EWHC 1205 (Ch).

[12] In general terms Mr Burns submitted that the Council had acted reasonably in its actions. The affidavit evidence refers to meetings being held over a period of time from the first occupation on 15 October 2011 and I was informed by Ms Bright that these had in fact continued up until Friday and at least from her point of view were ongoing. It is clear that there has been a high degree of discussion between the Council and the occupiers.

[13] There is no criticism by the applicant of the genuineness of the views held by the occupiers but counsel points to the bylaws which protect the general rights of the Auckland public to use the public spaces involved.

[14] Mr Burns submitted that it would be a relatively simple matter for the occupiers to simply remove all of their items from the site and then if the permanent injunction is refused they could simply return.

[15] Some costs are repeated from week to week. The issues as of this day of inconvenience and costs mentioned will not be greatly increased by declining the interim injunction so long as it is possible to set the permanent injunction hearing down at an early date.

[16] With the cooperation of the Registry I have obtained confirmation that the permanent injunction application can proceed starting on Wednesday 7 December 2011 at 10am with 2 days being available for the hearing. The respondents told me 7 days preparation would be enough for them.

[17] I direct that any evidence relied on by the respondents be filed and served as soon as practicable.

[18] I invite a memorandum from the applicant's solicitors as to what the address for service could be and whether the applicant will accept service electronically, and if so, to what email address. The memorandum should be sent to the respondents at the same time so they will know where to serve any documents.

[19] Accordingly the application for interim injunction is refused. I am not satisfied that the balance of convenience overcomes the natural justice issues of giving the opportunity to the respondents to respond and time to prepare.

[20] The urgent hearing date overcomes any such difficulty.

Dated at Auckland this 29th day of November 2011 4.05pm.

D M Wilson QC
District Court Judge