

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-2682**

Under the                   **JUDICIAL REVIEW PROCEDURE ACT 2016**

Between                   **AVERIL ROSEMARY NORMAN AND WARWICK BRUCE  
NORMAN**

                                  Applicants

And                       **TŪPUNA MAUNGA O TĀMAKI MAKAURAU AUTHORITY**

                                  First Respondent

And                       **AUCKLAND COUNCIL**

                                  Second Respondent

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**MEMORANDUM OF COUNSEL FOR THE FIRST RESPONDENT**

3 February 2020

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**MAY IT PLEASE THE COURT:**

1. This memorandum addresses the amended statement of claim filed on Thursday, 29 January 2020, the memorandum of counsel for the applicants as to timetabling direction filed the following day, and the memorandum of counsel for the second respondent (**Auckland Council**) filed today..
2. As the applicants acknowledge in their memorandum, this proceeding has been brought with urgency. The first respondent (**Tūpuna Maunga Authority**) is incurring holding costs in relation to the challenged replanting project, which it has undertaken to defer until this judicial review application was determined. It has given that undertaking without requiring a reciprocal undertaking in damages from the applicant.
3. The Tūpuna Maunga Authority relied on the agreements between the parties (and in particular the express proviso that the hearing for this matter would be set down in March 2020) in consenting to these arrangements, as the parties' joint memorandum of 8 December 2019 records.
4. On 9 December 2019, the substantive application was set down for a one day hearing on 20 March 2020. Directions were made that, among other things, required the respondents to file statements of defence and evidence on 31 January 2020. The close of pleadings date was 9 December 2012 (because that is less than 60 working days from the fixture date). Any amended pleadings filed after that date, therefore, required leave.
5. On 29 January 2020, the day before the respondents' evidence and pleadings were due, the applicants filed an amended statement of claim without first giving notice or seeking leave to do so. The amendments primarily introduce a fresh cause of action challenging the Auckland Council's 20 February 2019 notification decision in relation to resource consent for the felling of exotic trees and replanting of native trees on Ōwairaka/Te Ahi-kā-a-Rakataura/Mt Albert.
6. The applicants have not explained why that cause of action, which relates to a decision that was made nearly a year ago and that is referred to in their original statement of claim, was not included when this proceeding was filed. Nor have they explained why earlier notice of their instructions was not provided in the urgent circumstances.

7. In their memorandum the applicants submit that the amended statement of claim will require an additional day of hearing time. They seek a split hearing, with a first day addressing the issues in their initial statement of claim and a second day addressing the new cause of action.
8. The Tūpuna Maunga Authority agrees that two days of hearing time will suffice. However, a substantial gap between the two hearing days would prevent this matter being resolved urgently. It would also cause unnecessary duplication of preparation for the hearing for all parties, and increase the holding costs incurred by the Tūpuna Maunga Authority.
9. The Tūpuna Maunga Authority's position has always been, and remains, that this proceeding requires urgent resolution. In the circumstances, it seeks directions as follows:

- (a) If a second hearing day can be allocated before 15 April 2020, the Tūpuna Maunga Authority would consent to leave being granted for the proposed amended pleading, with costs reserved. It would not seek to re-open the issue of interim relief.

In their memorandum of counsel filed today, the Auckland Council observes that the usual order of evidence is apparently reversed in the directions proposed by the applicants. The Tūpuna Maunga Authority had understood the applicants' proposal to be that they would rely on the evidence already filed in support of the new cause of action, and that any reply evidence they filed would be strictly in reply.

If a second hearing day can be allocated before 15 April 2020 the Tūpuna Maunga Authority consents to the applicants being granted leave, and seeks orders in the terms proposed by the applicants at [12] of their 30 November 2020 memorandum, but on the basis that any reply evidence filed by the applicants is strictly in reply.

- (b) However, if a second hearing day cannot be allocated in that time, the Tūpuna Maunga Authority will oppose leave to amend the pleading.

Therefore, if no hearing date is available until after 15 April 2020, the Tūpuna Maunga Authority seeks directions that:

- (i) The applicant is to file and serve any application for leave to file an amended pleading by no later than 7 February 2020.

- (ii) The respondents are to file and serve any notice of opposition to that application, and / or any application to vacate vary the terms upon which interim relief is granted in this proceeding, by no later than 14 February 2020.

Those applications are to be heard together at the first available date for a two hour hearing.

10. The Tūpuna Maunga Authority has, today, filed a statement of defence responding to the current (ie, unamended) statement of claim. If the applicant is granted leave to file an amended statement of claim, the Tupuna Maunga Authority intends to file an amended statement of defence on 21 February 2020, in accordance with [12(b)] of the applicant's memorandum.

**DATED** this 3<sup>rd</sup> day of February 2020



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**Paul Beverley / Sebastian Bisley**  
**Counsel for the First Respondent**