
MINUTE (NO. 27) OF CHURCHMAN J

[1] Four counsel involved in these proceedings: C Linstead-Panoho, counsel for CIV-2017-485-377 and CIV-2017-485-262; D Stone and C Leuga, counsel for CIV-2017-485-238; and B Lyall, counsel for CIV-2017-485-201, all of whom are based in Auckland, have by email forwarded to the Registrar this morning, made a request for permission to travel to Rotorua.

[2] Presently the COVID-19 Public Health Response (Alert Levels 3 and 2) Order (No. 2) 2020 (the Order) is in force. Pursuant to the Order, Auckland is at Alert Level 3. Rotorua, where this hearing commenced on 17 August 2020 is at Alert Level 2.

[3] The four counsel (along with some other counsel are not based in Rotorua) have, to date, participated in the hearing by means of VMR. The hearing was adjourned for a week on 21 August 2020. The purpose of the adjournment is so that a “tikanga facilitation” process can take place.

[4] The various applicants in these proceedings have requested such a process in the hope that some agreement may be able to be reached between the applicants as to issues of tikanga relevant to these applications. The justification for the tikanga process was that should such agreement be possible, then the number of issues required to be determined by the Court would be reduced, thereby reducing the time required for the hearing itself. It was also submitted that such a process could avoid further damaging relationships between the various cross-applicants by reducing the amount of cross-examination required.

[5] The Court agreed with the request of the parties that the two pukenga appointed in this matter could act as facilitators. This came about as a result of an indication from the parties that, although all applicants favoured such a facilitation process, they had been unable to make arrangements to appoint a suitable facilitator.

[6] A significant aspect of the tikanga facilitation process is that it is not something that the Court itself is undertaking. The way it was explained to the Court was that no lawyers would be involved but that each applicant would nominate two tikanga representatives who would then engage with each other under the facilitation of the pukenga.

[7] The facts that the tikanga facilitation process is not presided over by the Court and is not a process in which lawyers are directly involved, are important in relation to the application made by the four counsel.

[8] As the email from the four counsel notes, counsel who wish to seek an exemption to travel beyond Alert Level 3, are required to obtain the permission of the presiding Judge. Such requests have been made, and where the physical presence of counsel is required and remote participation by VMR or other means is not feasible, the Courts have granted permission for counsel to travel.¹

[9] While counsel in the *Cridge v Studorp Limited* matter were granted permission to travel to Wellington for that lengthy hearing, the Court indicated that “It cannot be assumed weekend returns will be possible”.²

[10] The four counsel submit that while lawyers will not be taking an active role in the tikanga facilitation process, they consider that the prospects of success of the process will be greatly enhanced if they are able to attend and offer advice to their clients over the course of the facilitation process.

[11] I have reached the conclusion that because the facilitation process is an adjunct to, rather than being a part of, the Court hearing, and because it has been designed so as not to directly involve lawyers, that this is not an appropriate case for their request for permission to attend in Rotorua on 25 August 2020, to be granted.

[12] To the extent that their clients may wish to talk to them about the process, they are able to do so by telephone or various audio-visual means of communication.

¹ See Minutes No. 5 and No. 6 of Simon France J in *Cridge v Studorp Limited* CIV-2015-485-594 both dated 13 August 2020.

² Minute No. 5 of Simon France J, above n 1, at [5].

[13] The second request was that counsel be permitted to travel to attend the hearing in the week commencing 31 August 2020. There is no particular explanation given as to why counsel require permission to attend in person that week, particularly when they all participated by VMR in the first week's hearing.

[14] The week of the hearing commencing on 31 August 2020 is likely to involve expert historical witnesses giving their evidence. On the last two days of the first week of hearing, counsel (including some of the four counsel seeking permission to travel) successfully cross-examined by means of VMR in relation to similar evidence.

[15] One of the factors for the Court to consider in responding to a request for permission to travel from an area under Alert Level 3 is whether or not it is practicable for counsel to participate in the hearing by using remote technology. At least in respect of the giving of opening addresses and the cross-examining of expert witnesses, participation by remote technology has, to date, provided an adequate means for counsel to participate.

[16] I accept that there is an argument that when counsel are leading the evidence of their own witnesses and re-examining them or giving their closing addresses, there may be some practical advantages in having counsel physically present. However, based on the experience of the Court to date, it does not appear necessary for counsel to be physically present during the process of cross-examining expert witnesses.

[17] Accordingly, that part of the request is also declined.

[18] I am also mindful of the observations of Simon France J referred to above that if permission is granted for counsel to travel, there is no guarantee that they will be granted permission to return weekly to Auckland during a lengthy hearing. This hearing is scheduled to continue for a further six weeks after it recommences on 31 August 2020.

[19] Although the present request is declined, leave is reserved to counsel to make a further request should circumstances change.

Churchman J