M Hardy-Jones

IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

M2/96

UNDER The Local Government Official Information Act 1987

IN THE MATTER of an application for review pursuant to s34

BETWEEN M.J.H. DAVISON

Plaintiff

A N D THE MARLBOROUGH DISTRICT COUNCIL

Defendant

Hearing: 24 July 1996

Counsel: A.M. Powell for Plaintiff
M. Hardy-Jones with A.V. Clyne for Defendant

Judgment: 25 July 96

JUDGMENT OF ELLIS J.

Solicitors:
Duncan Cotterill, Nelson for Plaintiff
Radich Dwyer Hardy-Jones Clark, Blenheim for Defendant

This is an application for review under s34 of the Local Government Official Information and Meetings Act 1987.

In November 1994 the plaintiff's family owned a property just west of Ngakuta Bay on Queen Charlotte Drive. Following heavy rain the land above the property slipped and damaged the property. The slip included the public roadway above the property and so the applicant called on the General Manager of the respondent in late November. He deposed:

> "4. I met with Mr Bob Penington, an officer of the Council. The meeting took place at the Council's offices in Blenheim. We discussed the slip and in particular the cause of the slip. I wanted to know why this had happened again. The meeting was an amicable one. I got on well with Mr Penington. After some discussion, Mr Penington said the best way to go would be to obtain an independent report as to the cause of the slip. When we had this report, we would discuss the matter further. He made it clear to me that I would be able to see the report.
> 5. Mr Penington suggested that the report be obtained from Mr Charles Davidson, a retired engineer who was living in Wellington, but who knew the area very well. The Council was to arrange and pay for the report.
> 6. The meeting ended on the basis that we would meet again when the report was available.
> 7. At this stage, I had not threatened to sue the Council. I was aware that the Council had been sued successfully when the last slip had occurred in the same place, but at that stage I simply wanted to know why it had happened again, and Mr Penington appeared to want to know that too."

Mr Penington deposes to the extensive damage to the Marlborough District caused by the rain and how it was inspected and assessed by Council

officers including himself. He says in the first days following the storm he was conscious of the Council's position regarding liability and discussed it with Mr Radich, the Council's solicitor. As far as the applicant's property is concerned, he knew that the Council's predecessor had been successfully sued following slip damage to it some years before. Mr Radich deposed that he had an ongoing file relating to possible claims from landowners in the Sounds and those include claims arising from water accumulation due to roadworks and consequent slipping. He confirmed that he and Mr Penington discussed liability threats and claims in early November. He refers to the applicant's visit to Mr Penington and says:

> "13. When Mr Penington told me about the visit of Mr Davison we discussed what needed to be done in this particular situation. Between us we recognised and agreed that there was going to be a claim. We came to that conclusion:
>
> - Because of our experience with claims generally
> - Because of the circumstances of this particular property
> - Because of the likely active disposition of Mr Davison
> - Because of the size of the potential loss and the possible impacts of the loss on Mr Davison's situation given that an auction had been scheduled to take place
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> I think that I can say that our judgment has been proven to be correct.
>
> 14. Mr Penington and I decided that we needed to engage Mr Charles Davidson. Mr Davidson was formerly of Dunedin Ayson, Registered Engineers of Blenheim but at the time of the rain storm had gone into semi retirement and was living in Wellington. We thought that he would know about the history of the property and it has turned out that he had been called as an expert witness for Council's predecessor in relation to the previous litigation.

15. Mr Penington and I agreed that Mr Davidson would be engaged and it was left to Mr Penington to make the arrangements."

Mr Penington then wrote to Mr Davidson. The letter is exhibited and is dated 17 November 1994. It says "What I am keen to do is ensure that we have appropriate reporting mechanisms established on any possible liability claim" and then refers in particular to the subsidence onto the plaintiff's family land. Mr Davidson then sent a draft report to the Council on 29 November 1994. The plaintiff asked the Council for a copy of the report. The Council refused claiming it was privileged, having been obtained to enable it and its solicitor to conduct and advise regarding anticipated litigation. The plaintiff asked the Ombudsman to intervene. The Ombudsman recommended to the Council in November 1995 that it release the report to the plaintiff. The correspondence exhibited does not include the letter from the Ombudsman to the Council, but other correspondence refers to the privilege claim. So I do not have the benefit of his reasoning for rejecting the Council's claim to privilege. Pursuant to s32 of the Local Government Official Information and Meetings Act 1987, the Council had a public duty to disclose the report within 21 days unless it passed a resolution deciding otherwise. That resolution must be recorded in writing and a copy given to the Ombudsman. Further, by s33 the Council must publish the decision in the Gazette and publicly notify it within the District. The Council complied with s32 but failed to comply with s33, however that failure is waived

by the plaintiff. Section 34 gives the plaintiff a right of appeal to this Court. It provides:

> "34. Right of review - (1) Where -
> (a) A recommendation is made under 30(1) of this Act in respect of a request made under section 10 of this Act; and
> (b) A decision is made under section 32(1) of this Act in respect of that recommendation, -
> the person who made that request may apply to the High Court for a review of that decision.
> (2) An application under subsection (1) of this section may be made on the ground that the decision was beyond the powers conferred by sections 32 and 33 of this Act or was otherwise wrong in law.
> (3) On an application under subsection (1) of this section, the High Court may -
> (a) Make an order confirming that the decision was validly made; or
> (b) Make an order declaring that the decision was beyond the powers conferred by sections 32 and 33 of this Act or was otherwise wrong in law.
> (4) Unless the High Court is satisfied that an application brought under subsection (1) of this section has not been reasonably or properly brought, it shall, in determining the application and irrespective of the result of the application, order that the costs of the applicant on a solicitor and client basis shall be paid by the local authority that made the decision in respect of which the application is brought."

The plaintiff therefore commenced these proceedings and claims that the Council was wrong in law in its claims to privilege. It became a neat point in argument before me.

The matter of privilege in New Zealand is authoritatively dealt with by the Court of Appeal in *Guardian Royal Exchange Assurance of N.Z. Ltd v Stuart* [1985] 1NZLR 596 and I quote from the headnote:

> "When litigation is in progress or reasonably apprehended, a report or other document obtained by a party or his legal adviser should be privileged from inspection or production in evidence if the dominant purpose of its preparation is to enable the legal adviser to conduct or advise regarding the litigation."

I should expressly state that legal professional privilege is one of the reasons recognised by s7 of the Act as a reason for withholding official information "unless such is outweighed by other considerations which make it desirable in the public interest to make the information available".

Towards the end of the hearing I asked to see Mr Davidson's report as I considered its terms would bear on the question whether or not litigation was apprehended, and whether or not the dominant purpose of its preparation was to enable the Council to conduct its defence and its legal advisers to advise regarding the litigation. My reading of it confirms my view that legal professional privilege is correctly claimed by the Council. There can be no doubt it had an apprehension of litigation by the plaintiff's family, and the report was obtained to assist it in assessing and meeting that claim.

The plaintiff did not suggest any other overriding matter, that would render disclosure necessary in the public interest. Indeed the subsequent facts tend to show otherwise. The plaintiff's family (a trust I understand) have commenced proceedings against the Council, and the defence is undertaken by insurers. The Council is contractually bound to the insurers to resist the proceedings, and so disclosure must be seen as subject to discovery in those proceedings. No doubt the report or its substance will eventually be disclosed if the litigation goes to a hearing, and reciprocal disclosure of reports may be part of the pre-trial process. All that can be dealt with elsewhere.

The plaintiff's claim is accordingly dismissed. Mr Hardy-Jones quite properly does not resist an order for costs in accordance with s32(4). I consider the claim has been reasonably and properly brought and so the Council must pay the plaintiff's costs on a solicitor and client basis. If these cannot be agreed, they shall be fixed by the Registrar.

AMD Cam J