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IN THE WAITANGI TRIBUNAL **WAI 2378**

In the matter of The Treaty of Waitangi Act 1975

And a claim by Gina Mahara, Diane Holloway and Apihaka Mack

MEMORANDUM OF THE CROWN OPPOSING NON USE OF EXHIBITS

10 August 2012

RECEIVED
Waitangi Tribunal
10 August 2012
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

Introduction

1 This memorandum is filed in response to the Memorandum of Counsel for the Wai 2378 claimants dated 6 August 2012.

2 In that memorandum counsel went beyond seeking confidentiality for exhibits SK-B and SK-C to the affidavit of Sarah Kalmakoff and submitted that the documents not be filed and their use be restricted in its entirety. See paragraph 20 of that memorandum.

3 Document SK-B is the attachment order from IRD on payments to David Stone dated 13 April 2012; SK-C is the letter of 24 February 2012 from Legal Aid Services to IRD responding to specific questions.

4 It would be apparent from the way the Crown dealt with the two exhibits in the first place that the Crown does not oppose a confidentiality order restricting access to and the use of the documents to the Tribunal, the Crown and the claimants in WAI 2378 or at least their counsel.

5 However, the Crown does **oppose** not being able to **file** those documents or **use** them.

Grounds of Opposition

6 The Crown says that both SK-B and SK-C should be filed and able to be used by it with the protection for Mr Stone being a confidentiality order.

7 In relation to SK-C, it is a response to IRD's questions. The content of that letter was put in issue by the claimants (specifically Diane Holloway). It would therefore be a breach of natural justice not to be able to refer to the letter itself.

8 In relation to SK-B Mr Stone at paragraph 9 of his affidavit summarises what he says are the main issues in the proceedings is:

> a. the delays in processing and administering Waitangi Tribunal legal aid;
> b. the reasons for those delays;
> ...
> d. the prejudice caused to the claimants as a result.

9 Delays do not automatically prejudice claimants in a manner sufficient to breach the Treaty. The link between (a) and (d) is, on the affidavits filed in support, because of the extreme financial hardship to Mr Stone said to have resulted from the delays.

10 The Crown says that the information in SK-B, when linked to other information in Sarah Kalmakoff's affidavit, shows that there must be other reasons for the dire financial position Mr Stone is in.

The Claimant Affidavits

11 The principal affidavit filed in this particular claim was by Diane Holloway WAI 2378 #A1. Diane Holloway deposes that she has been the Practice Manager and Billing Clerk for David Stone at Te Mata a Maui Law since its inception on 1 July 2010. The thrust of the affidavit is a complaint about Legal Aid being slow in payment and problems getting invoices accepted with the consequential impact on the financial position of Mr Stone. That, in turn, is said to affect his ability to act.

12 The affidavit has a series of major headings. Immediately before paragraph 18 and covering the whole section through to paragraph 28 is the heading "Inland Revenue Department". In paragraph 20 Diane Holloway referred to the letter IRD wrote to the Ministry of Justice, Ministry of Justice reply and the attachment order.

13 In relation to the reply, Diane Holloway expressly stated "MoJ replied that all TML invoices were faulty and therefore it is our fault."

14 That is, the claimants have directly put in issue the contents of the letter from Legal Aid to IRD.

15 Paragraphs 22-27 then list problems in paying staff, retaining the phone and retaining the office car. All this is apparently attributed to the delays in paying legal aid. There is an implication that all the financial problems of TML, including problems with IRD leading to the attachment order, can be attributed to slow payment of legal aid. The Crown denies this.

16 There are then two affidavits in support. Both the deponents complain that David Stone has not been able to attend hui that they wanted him to attend because he is financially unable to do so.[1] They each refer to the explanation that Mr Stone had given to them which attributed his financial inability to attend to delays in payment of legal aid.

Discussion

17 The reply to IRD is relevant because of the allegation as to its contents. The Crown must be entitled to put in the letter and allow it to speak for itself.

18 The attachment order is relevant because of the size of the amount in the attachment order and also its timing. Mr Stone, in his memorandum at para 9, says that penalties and interest costs have been incurred as well as late filing fees. That comments highlight that the arrears of tax would have been outstanding for a significant period of time before the present delays in payment that the Crown has acknowledged occurred.

19 There is therefore a real issue as to whether Mr Stone's financial position is because Legal Aid has been slow in payment invoices or whether there is another cause. This is especially given the relatively high amounts of Legal Aid that have been paid to TML/David Stone in both 2011 and 2012 as set out in the affidavit of Sarah Kalmakoff.

20 The size of the attachment order also emphasises that the attachment order will take some time to be satisfied. That is Mr Stone can only receive 70% of the approved amount of an invoice even if he himself has incurred significant out of pockets to other providers. This will be affecting his cash flow from the date of the order. The cash flow problems particularly identified by Ms Holloway in paragraphs 23 to 27 post date the attachment order coming into effect, as does Mr Stone's non-attendance at recent hui that Apihaka Mack refers to.[2]

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1 See affidavit of Apihaka Mack WAI 2378 #A3 at para 5. Gina Mahara WAI 2378 #A2 at para 4.

2 See paragraph 5 of the affidavit.

21 In other words the evidence is relevant and therefore should not be excluded. The concerns of Mr Stone can be addressed by confidentiality orders that are not opposed.

Incidental matter

22 The memorandum from Mr Stone does however raise a procedural issue that the Crown draws to the attention of the Tribunal. Rule 13.5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 provide, as follows:

> **Independence in Litigation**
>
> 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.
>
> ...
>
> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.

23 "Court" is defined to include a Tribunal.

24 As noted, the principal affidavit in support of this particular claim was from Diane Holloway as Practice Manager and Billing Clerk for David Stone. Much of that affidavit puts into issue the dealings between David Stone and Legal Aid Services with the facts being very much in dispute as evidenced by the affidavit in response of Sarah Kalmakoff.[3] Gina Mahara deposes to what "*David told us*" or what "*David first explained*". Likewise Apihaka Mack states "*David has explained*".[4]

25 That is the conduct of Mr Stone or another member of his practice is an issue in the matter before the Tribunal. The problem could, of course, be overcome by TML, or (as Mr Stone appears to be a barrister sole) his instructing solicitor, instructing other counsel.

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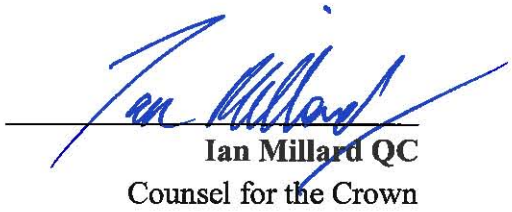
3 WAI 2374 28 July 2012.

4 See paragraph 5.

DATED at Wellington this 10th day of August 2012



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