

**In the High Court of New Zealand at
Palmerston North**

CIV:

Under the Declaratory Judgments Act 1908
in the matter of a purported agreement in 1973 in
relation to stormwater discharge into
Lake Horowhenua
and
in the matter of a purported ratification of the 1973
agreement by the Horowhenua District
Council on 2 October 2013.

between

[withheld]

(First Plaintiff)

[withheld]

(Second Plaintiff)

[withheld]

(Third Plaintiff)

[withheld]

(Fourth Plaintiff)

[withheld]

(Fifth Plaintiff)

[withheld]

(Sixth Plaintiff)

[withheld]

(Seventh Plaintiff)

[withheld]

(Eighth Plaintiff)

[withheld]

[wit
(Ninth Plaintiff)

[withheld]
(Tenth Plaintiff)

[withheld]
(Eleventh Plaintiff)

[withheld]
(Twelfth Plaintiff)

[withheld]
(Thirteenth Plaintiff)

[withheld]
(Fourteenth Plaintiff)

[withheld]
(Fifteenth Plaintiff)

[withheld]
(Sixteenth Plaintiff)

and

Horowhenua District Council, a
Council duly constituted as a territorial
authority under the Local Government
Act 2002 (Defendant)

Application for Declaratory Judgment

Dated

**BENNION
LAW**

Barristers and Solicitors
[withheld]

Counsel: [withheld]

May it please the Court

1. The Plaintiffs are members of the Muaupoko tribe, the beneficial owners of Lake Horowhenua (“the Lake”) and certain lands adjoining and encircling the lake; the legal and beneficial ownership as well as the boundaries of the land and Lake being more fully described in the subsections of section 18 Reserves and Others Lands Disposal Act 1956 (“ROLD”).
2. The Lake is the taonga and treasure of the Muaupoko tribe.
3. The Lake is recognized by the National Institute of Water and Atmospheric Research (“NIWA”) as being one of the worst polluted lakes and also one of the lakes with the worst eutrophication in all of New Zealand.
4. Muaupoko are no longer able to safely exercise their piscatory and other rights of ownership affirmed by s18 ROLD in relation to the Lake and land, because of the pollution and eutrophication of the Lake, which is at levels dangerous to the health of Muaupoko and other people.
5. The Defendant is since 1989 the territorial authority which under the Local Government Act 2002 is now responsible for the area including that formerly known by and administered under the Municipal Corporation Act 1954 as the Levin Borough Council, which included and includes the present town of Levin and the Lake, the land and its surrounds. The Lake is approximately some 2 kilometres from and west of the centre of Levin.
6. In 1973 or earlier, the Levin Borough Council had constructed, built, erected and maintained a system of pipes and drains, (including the Queen St. drain being the stormwater and discharge drain on the major street of Levin and the major stormwater catchment within the town,) with the intent, purpose and objective of causing, permitting and allowing the stormwater and discharge water of the town of Levin to be discharged into and through those discharge stormwater pipes and drains (such as to constitute the stormwater system of Levin) and thereafter to flow and discharge directly into Lake Horowhenua.

7. The legal owners of the lake and its surrounding lands are the Lake Horowhenua Trustees (“trustees”) who by s18 ROLD own the land for and on behalf of Muaupoko. The 4th, 10th and 11th [Applicants/Plaintiffs] are current trustees of the Lake Horowhenua Trust.
8. The Mayor, Councillors and Citizens of the Borough Council of Levin (“the town” or “Levin”) in 1973 caused their then solicitors to prepare a draft Agreement between the town and the trustees (legal owners) of the Lake and its surrounding or encircling lands, which draft Agreement had as its principal objective to secure the authority of the trustees to permit and allow the stormwater and discharge water of the town to flow through the pipes and drains, including pipes and/or drains to be built over, across, under or through the land legally owned by the trustees and thereafter into the Lake.
9. The draft 1973 Agreement was signed by the 13 trustees of the Lake and those signatures were witnessed on a date or dates unknown.
10. No valuable consideration whatsoever is expressed in the draft Agreement in favour of the beneficial and/or legal owners of the Lake and land, notwithstanding the threatened and actual risks to the Lake and to the trustees and to Muaupoko to be caused by the flow of stormwater and discharge water, including through the system of pipes and drains built or to be built over, across, under or through the land owned by the trustees, so as to permit the flow of stormwater and discharge from the town to enter into the Lake.
11. In 1971 some draft and conditional agreement (the terms of such draft being unknown) was contemplated between the trustees and the then Levin Borough Council, subject to yet further material clauses to be drafted and included, in relation to the stormwater crossing through the trustee-owned land and in relation to the stormwater entering the Lake. The Borough Council as its Item 2473 resolved on 17 May 1971 that proposed arrangements with the trustees be approved and that negotiations take place and that other terms be drafted into an Agreement.
12. It is obvious and clear that at 17 May 1971 the Borough’s solicitors were still in the process of drafting the terms of the Agreement. The draft Agreement is dated 3 May 1973 (almost 2 years later) and the draft

Agreement is captioned on its final page (bearing the drafting solicitors firm's name) as having been created in "1973".

13. The Borough Council did not during those 2 years from May 1971 to May 1973 have ever placed before it, nor did it ever approve or resolve to approve the actual 1973 Agreement in the terms in which it was drafted. In fact the Borough Council (and since 1989 its partial successor the Horowhenua District Council) took no formal steps to enter into the 1973 Agreement to make it enforceable or at all until its purported ratification 40 years later on 3 October 2013.
14. Despite the 1971 resolution to enter into an Agreement, the Borough Council never as a fact actually entered into the draft Agreement. The draft Agreement was never signed by any of the Mayor or Councillors or Town Clerk and in particular was not signed by two Councillors and the Town Clerk and further the Common Seal of the town was never affixed to the Agreement as required by law and/or as required by the Agreement itself.
15. The draft Agreement bears a handwritten date of 3 May 1973, as the date on which the draft Agreement was to be entered into.
16. It appears that the draft Agreement, has been subsequently franked, on an unknown date in 1973 for stamp duty, impressed with the sum payable as being: zero dollars and cents.
17. In proceedings instituted in the Maori Land Court against the Horowhenua District Council and others, the First Plaintiff has pleaded various causes of action against the present Defendant, including for public and private nuisance in causing the stormwater and discharge of the town to enter into the Lake resulting in its pollution, eutrophication and degradation.
18. In those proceedings the Defendant has pleaded or otherwise relied upon the draft Agreement as a complete or partial defence to the causes of action against it.
19. The Defendant however, realized in the course of that litigation, probably in 2012, that the draft Agreement from 1973 was never signed and sealed and was therefore unenforceable and/or unlawful. To purport to remedy this the Defendant formally proposed to its Mayor and

Councillors, on the written recommendation of its present legal advisers (also representing the Defendant before the Maori Land Court) and by the single report of, David Clapperton, its Chief Executive, to ratify the 1973 draft Agreement.

20. The report by the Chief Executive to the Mayor and Councillors included the statements:

“In accordance with section 76 of the Local Government Act 2002, this report is approved as:

- a. containing sufficient information about the options and their benefits and costs, bearing in mind the significance of the decision; and,
- b. is based on adequate knowledge about, and adequate consideration of, the views and preferences of affected and interested parties bearing in mind the significance of the decision.”

21. The report by the Chief Executive to the Mayor and Councillors stated that the purpose of this report is to seek Council’s ratification of a 1973 agreement signed by all the Horowhenua Lake Trustees authorising the former Levin Borough Council to drain stormwater across the one-chain strip/dewatered area from the Queen Street drain to discharge into the Lake. Furthermore, this report stated that ratification was to support Council’s opposition to an application by Mr Phillip Taueki to dam or block the Queen Street, Levin drain.

22. In effect, the ratification was to secure and enhance the pleaded defence against the proceedings by the First Plaintiff in nuisance against the Defendant, in the Maori Land Court.

23. The report File No. 13/851 to the Mayor and Councillors was dated 2 October 2013 and called “Lake Horowhenua – Queen Street Drain Agreement”. The report certified by the Chief Executive stated that the proposed ratification:

- a. was “not significant in terms of s76 Local Government Act 2002” and

- b. involved no costs in terms of : “Community Well-Being”, “Consenting Issues”, “L(long) T(erm) P(lanning) Integration” and
- c. involved “no legal considerations”.

24. The report to the Mayor and Councillors of the Defendant was dated the day before the meeting of the Council. The report stated that “the attachments [to it] are not readable electronically” so hard copies were delivered by post to the Mayor and Councillors. The two attachments unable to be read electronically were described as:

No.	Title
A	Agreement between Lake Trustees and Levin Borough Council [the 1973 draft Agreement]
B	Minutes Levin Borough Council Meeting 17 May 1971

25. On 2 October 2013, the Mayor and Councillors of the Defendant decided, with one Councillor dissenting, to ratify the 1973 draft Agreement. The relevant extract of the report, with the recommendation that it be implemented, which was formally adopted by the Council, is:

“2.3 That Council ratifies the 1973 agreement signed by all the then Horowhenua Lake Trustees authorizing the former Levin Borough Council to drain stormwater across the one-chain strip/dewatered area from the Queen Street drain to discharge into the Lake.

2.4 That the Mayor, Deputy Mayor and Chief Executive be authorized to endorse the said 1973 agreement.”

Legal analysis in support of the Declarations

The 2013 Ratification

26. The purported ratification of the 1973 Agreement between the Lake Horowhenua Trustees and the Levin Borough Council on 2 October 2013 by the Horowhenua District Council is unenforceable, unlawful, null and void and of no effect as:

- a. At the time of the purported ratification
 - i. the Levin Borough Council was formally dis-established in 1989 and amalgamated into the Horowhenua District Council. The Horowhenua District Council did not, by the Municipal Corporations Act 1954 or otherwise, obtain or accrue to itself, in law, the rights (if any) of the Mayor and Councillors of the Levin Borough Council and/or of the Levin Borough Council itself to ratify the 1973 draft Agreement. The purported ratification was ultra vires the Horowhenua District Council. The Mayor and Councillors of the Levin Borough Council were not then or now agents of the Horowhenua District Council. An undisclosed principal cannot in law ratify the acts of another's agent; and/or
 - ii. the ratification did not take place within a reasonable time; and/or
 - iii. the ratification did not take place in accordance with the prevailing laws and circumstances, such that the purportedly ratifying party could itself have in 2013 lawfully made the agreement or contracted in the terms of the 1973 draft Agreement which it purported to have ratified. The Horowhenua District Council could not have, as a matter of law on 2 October 2013 itself entered into the identical 1973 draft Agreement that it has purported to ratify; and/or
 - iv. the ratification inequitably prejudiced the rights of third parties namely Muaupoko and other people;
 - v. the 1973 draft Agreement was not a lawful contract and/or not a contract or agreement at all capable of being ratified,

for any or all of the same pleaded reasons set out in 27. a. i. (1) to (5) (inclusive) below;

- vi. the ratification is an illegal or unlawful contract or agreement, contrary to statute or inconsistent with the object of ROLD and other legislation.

The 1973 Draft Agreement

27. The 1973 Agreement is unenforceable, unlawful, null and void and of no effect as:

- a. it was only drafted by the Levin Borough Council's then solicitors on a date unknown in 1973, and there is no evidence as to the nature, terms, content or form of the proposal document (if any) considered by the Levin Borough Council's Works Committee in 1971, and in turn by the Levin Borough Council on 17 May 1971, and in respect of which a resolution was passed. No agreement existed at the date of that resolution, as an essential term or terms remained to be negotiated and/or agreed and/or in respect of which there remained a gap or gaps to be filled. It did not constitute a validly formed contract or agreement.
 - i. It is not a deed, further and/or in the alternative it is unenforceable as:
 - (1) it is not signed for and on behalf of the Levin Borough Council; and/or
 - (2) it was not sealed for and on behalf of the Levin Borough Council; and/or
 - (3) it was not witnessed in accordance with law; and/or
 - (4) it was not delivered in accordance with law; and/or
 - (5) it does not stipulate or provide for any valuable consideration.

- b. It is an illegal and unlawful agreement contrary to and/or inconsistent with the objects, purposes and rights granted or affirmed to Muaupoko (and the trustees) by s18 Reserves and Other Lands Disposal Act 1956, namely in permitting, allowing and causing material degradation, pollution, destruction, impairment and/or danger to the waters, soil, ecology and fisheries (including eeling) of Lake Horowhenua and its streams, and/or to Muaupoko and other people;
- c. It is an illegal and unlawful agreement contrary to and/or inconsistent with the objects, purposes and rights in favour of Muaupoko (and the trustees) by the Town and Country Planning act 1953 and/or the Soil Conservation and Rivers Control Act 1941, namely in permitting, allowing and causing material degradation, pollution, destruction, impairment and/or danger to the waters, soil, ecology and fisheries (including eeling) of Lake Horowhenua and its stream) and/or to Muaupoko and other people;
- d. It is an illegal or unlawful agreement to perform a tort, namely to commit public and/or private nuisance of Lake Horowhenua and/or contravenes or is inconsistent with or violative of the statutory objects of:
 - i. s191(a) and (b) Local Government Act 2002
 - ii. Te Ture Whenua Act 1993
 - iii. Resource Management Act 1993
 - iv. Other statutory laws including ROLD and the common law and equity of New Zealand.

Relief Sought

- 28. The Plaintiffs apply for Declarations pursuant to s3 Declaratory Judgments Act 1908 that:
 - a. The agreement or document of ratification made by or authorized by or evidenced in writing by the Horowhenua District Council on 2

October 2013 as to ratify the 1973 Agreement between the Lake Horowhenua Trustees and the Levin Borough Council is invalid, unlawful, unenforceable and of no legal effect.

- b. The draft 1973 Agreement in its formation and/or its performance is invalid, unlawful, and of no legal effect.
- c. The draft 1973 Agreement is in any event unenforceable in law.
- d. Such further or other Declarations or relief as may be just.
- e. Costs.

Case Management Directions Sought

- 29. The Plaintiffs apply for directions to secure an expedited substantive hearing of this originating summons, with a one day fixture being required from (and including) 9 December 2013, to be heard at the High Court at either Wellington or Palmerston North, as better suits the convenience of this Honourable Court.

Dated at Wellington and Hong Kong this 4th day of October 2013.

[withheld]

Counsel for the Plaintiffs