What the LIM cases have taught us

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As a matter of general practice lawyers recommend that their clients obtain a land information memorandum (LIM) before purchasing a property.

The information that must be contained in a LIM is prescribed by s44A(2) of the Local Government Official Information and Meetings Act 1987. The Council is obliged to disclose information it knows about the property, but not information which is apparent from the District Plan. The obligation is broad and includes potential erosion, subsidence, flooding, rates, consents under the Building Acts and information notified to it under s 124 of the Weathertight Homes Resolution Services Act 2006 ('WHRS Act'). Councils may also provide any further information that it considers, at its discretion, to be relevant.[1]

The obligation to provide information can lead to claims if the s 44A(2) information is missing or inaccurate. In the last ten years there have been a number of important judgments that have explored the duty owed by Councils when providing LIMs. This article summarises these decisions.

Resource Planning Management Ltd & Anor v Marlborough District Council[2]

This claim concerned a winery that purchased land near the Wairau River. The land is known as Fox's Island because it had once been surrounded by water, but is now dry as the river has been diverted. LIMs were issued by the Council to the winery prior to the land being purchased. At the time the land was purchased, a proposed District Plan was being developed that ultimately introduced a flood hazard overlay over the land. The winery made a submission on the proposed District Plan in an effort to have the flood hazard overlay removed, but this did not happen and the winery went into liquidation.

A claim was brought against the Council. Many complaints were made but the focus was on the LIMs that were issued which were said to be misleading because certain information had not been disclosed. The information allegedly not disclosed was (a) the Council's assessment that the land was hazardous, (b) the opinion of staff in the Council's Rivers Department about the wisdom of having permanent buildings on the site and (c) the Council's assessment that the land was likely to be included within the flood overlay.

The Council's Rivers Engineer was firmly of the view that the land was not suitable for building and that there ought to be a thirty year moratorium on building in any event. Separately, the head of the Rivers Department at the Council believed that the land was in the "most dangerous" area of the Wairau plain.

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The LIM provided general information about the land. It warned of the threat of flooding, both directly and by erosion and referred to an engineer's report.

The Court accepted that (a) the hazardous nature of the land had been made plain; (b) the views of the people in the Rivers Department was not the official policy of the Council, hence their views did not need to be disclosed in the LIMs; and (c) while there was no disclosure of the proposal to impose the flood hazard overlay, the overlay had not been finalised at the time of the application for the LIMs.

The Court accepted that until the flood hazard overlay had been finalised, it did not need to be referred to in the LIM. The (then) current District Plan had referred to the ongoing review of measures to reduce flooding and for this reason the plan could be revised at any time. This was sufficient notice of the possibility of a change being made that might affect Fox's Island.

Weir v Kapiti Coast District Council[3]

The Council engaged a coastal scientist, Dr Shand, to prepare a coastal erosion assessment. The final report of 2012 was relied upon by the Council to place coastal erosion 'prediction lines' on its cadastral maps over the length of the Kapiti coastline and associated estuaries ('Shand lines'). The lines predicted possible incursion of the coastline 50 and 100 years into the future. Two lines were predicted; one based on the incursion being managed as best possible, a second, the incursion if no coastal protection was undertaken. The Council used the lines in its review of its District Plan and the proposed plan released in 2012 included 'no build' and 'relocatable build' areas based on the Shand lines.

The Council took the view that the information in the Shand report needed to be linked to property files and made available on LIMs. A group of affected property owners applied for judicial review of the decision to note up the LIMs in this way. Their argument was that the Shand lines were unreliable. The Council's position was that the information was uncertain, but given the clear wording of section 44A(2), it was required to include this information. It had no discretion.

In spite of the uncertainty regarding the reliability of the Shand lines, the Court found that the Shand reports contained information in relation to potential erosion. The words "*potential erosion*" had to be read widely. For future events, such as erosion,

Photo by flickr user Nick Hobgood

it was sufficient if there was a *possibility* of such future events occurring. The Court said the information in the Shand report met this threshold.

The Court was asked to determine what "known to the Council" meant. This is because Dr Shand's report was speculative and the information had not been discovered by the Council itself. The Court accepted that the reports by Dr Shand were known to the Council, saying:

> *"[64] ...the Council needs to know about the report but does not need to believe that the predictions in them are accurate or even probably accurate."*

The landowners argued that the Council always had a duty to consult before placing information on a LIM. The Court disagreed; there was no discretion over whether to include information on LIMs. The Council's only discretion related to how the information was portrayed in the LIM.

The Court was concerned however that the Shand lines were too definitive, there needed to be a better explanation of how they were arrived at. This was because the presence of the Shand lines and a LIM would undoubtedly affect the value of a property.

The hearing was adjourned at that point to allow consultation over how to present the Shand Report information on LIMs. Following further academic review and public hearings on the proposed District Plan, the Council decided not to include the Shand lines in the District Plan and to remove the lines from all LIMs. Instead, the Council placed a general precaution regarding coastal erosion on LIMs.

Marlborough District Council v Altimarloch Joint Venture Ltd & Ors[4]

In 2004 Altimarloch Joint Venture Limited (AJVL) purchased a large rural property for $2.65 million.

The agreement for sale and purchase included resource consents for water rights to remove 1,500 cubic metres of water per day from a stream for the purposes of irrigation. The term in the contract was drafted from information set out in the LIM that had been obtained by the vendors' agents.

The information about the water consents in the LIM was incorrect. The property held resource consents to take only 750 cubic metres a day from the stream. The LIM representations were repeated by both the solicitors and the real estate agents for the vendors.

The vendors knew the correct situation but without noticing the mistakes made by their solicitors and real estate agents, they signed the sale and purchase agreement for the property containing the incorrect information about the water rights.

AJVL sued the vendors who in turn sued their solicitors, the real estate agents and the Council.

Damages of approximately $1.1 million were assessed on the basis that that was the cost to secure an extra 750 cubic metres of water a day to the property. The vendors' solicitors and real estate agents, pursuant to their terms of instruction by the vendors, were both found liable to the vendors for the full $1.1 million.

As the value of the land was $2.675 million, and its value without the water rights was $2.55 million, the tort measure of damages, that is the measure applying

to parties such as the Council, was the difference ($125,000) representing the loss in value.

The Supreme Court considered whether a duty of care was owed by the Council when providing a LIM. It found that both proximity and policy considerations favoured the imposition of a duty of care on territorial authorities so that if they negligently gave erroneous information on a LIM and the recipient relied on that information to its detriment, it will be liable for the loss their negligence caused, save possibly for the discretionary information given under subsection (3).

As an aside, this case has had a lot of academic attention because the measure of damages for the contract breakers (the vendors, real estate agents and the vendors' solicitors) was substantially more than the damages awarded for the Council's negligence. It is one of the leading New Zealand authorities on the approach to equitable apportionment.

York v Westland District Council[5]

This case was an unsuccessful application for leave to appeal from a decision of the Court of Appeal striking out a proceeding filed in July 2012 based on an allegedly negligently prepared LIM issued in August 2005 when the claimant purchased a motel.

The Court of Appeal, following *Altimarloch,* found that the loss was suffered when the claimants paid a price for the property that exceeded its true value and the claim was time-barred. In dismissing the application for leave, the Supreme Court declined to distinguish *Altimarloch* and observed that limitation had been considered by the Supreme Court in *Murray v Morel & Co* and *Thom v Davys Burton.*

Henry & Tan v Auckland Council[6]

This dispute concerned a cliff top property in Bucklands Beach with spectacular views over the Hauraki Gulf. In August 2008 a slip affected the neighbouring property and spread to undermine the claimants' property. As a result, a two year old building was demolished down to the foundations. Proceedings were issued against the Council, focusing on information provided in a LIM that the claimants obtained prior to their purchase.

The LIM notation came about after some scrutiny of the stability of the land by geotechnical engineers employed by the Council, the developer and the next door neighbour. Several drafts were prepared (with the involvement of lawyers) and finally the wording was agreed.

The Court expressed the Council's duty to:

"...identify the relevant special feature or characteristic of the land and must, within the parameters of what is actually known by the Council, be accurate and not misleading...the Council need not include all the information about the subject property that is in the Council's possession and it has a wide discretion as to how the information is disclosed".[7]

The Court went on to say that the Council's role is not advisory; rather its focus is on putting the LIM recipient on notice of particular facts within its knowledge.

The other interesting observation by the Court was that the Council does not owe a duty of care to an existing landowner when preparing a LIM but the overriding public law obligation of fairness means that Councils would be required to consult with landowners about the wording of LIMs.

Summary

We now have a useful body of case law to guide us in the interpretation of s 44A. The cases tell us whothe Council owes duties to, and the extent of those duties. Due to the cases we know:

- The duty the Council owes is to provide information to potential purchasers that is within the Council's knowledge.
- That information needs to be accurate and not misleading.
- It should not be advisory i.e. it is not for the Council to advise the LIM recipient on what to do or what action to take upon them receiving the information.
- The Council does not need to provide information in the LIM that is contained in the District Plan.
- The opinions of Council employees are not the official policy of the Council and do not need to be included in LIMs.
- The Council does not need to believe the information in its possession – it is sufficient that it knows about it.
- There is no duty of care owed to current owners, but there is a public law duty to consult with them over the terms of the LIM wording.
- The Council may not owe a duty in respect of discretionary information given under s 44A(3) of the Act.
- If suing on a LIM where the loss was suffered before 1 January 2011, the claimant has six years to bring proceedings.[8]
- The Council has a discretion as to how it discloses the information it holds.

Editor's Note:

The issue of water rights in the *Altimarloch* case raises broader issues about:

- purchasers making their own enquiry (even getting an expert report) since it is such a critical matter when looking at water supply to a vineyard; and
- being careful where a Council is not a unitary authority as was the case in *Altimarloch*. Water and contamination issues are primarily a regional Council's responsibility and therefore separate enquiry to the regional Council is needed.

1. s. 44A(3) of the Local Government Official Information and Meetings Act 1987
2. HC, Blenheim, CIV-2001-485-000814, 10 October 2003, Ellen France J
3. [2013] NZHC 3522 and [2015] NZHC 43
4. [2012] 2 NZLR 726
5. [2014] NZSC 71
6. (2015) 16 NZCPR 683
7. Para [90] of the judgment of Justice Ellis
8. Post that date limitation will be dictated by the provisions of the Limitation Act 2010.

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