

*under:* the Trusts Act 2019 and Part 18 of the High Court Rules 2016

*in the matter of:* an application under sections 130 and 133 of the Trusts Act 2019 by **William Beau Holland, Natalie Anne Bridges, Peter John Blackwell, Peter John Farmer, Mark Edmond Arundel and Tina Lynn Jennen**, as trustees of the Tauranga Energy Consumer Trust  
*First plaintiffs*

*and in the matter of:* an application under section 133 of the Trusts Act 2019 by **William Beau Holland, Natalie Anne Bridges, Peter John Blackwell, Peter John Farmer, Mark Edmond Arundel and Tina Lynn Jennen**, as trustees of the TECT Charitable Trust  
*Second plaintiffs*

Memorandum of counsel in relation to application for directions as to service and representation

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Dated: 13 May 2021

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Reference: M D Arthur (michael.arthur@chapmantripp.com)

L C Bercovitch (liora.bercovitch@chapmantripp.com)

Counsel: Justin Smith QC (Justin.smith@stoutstreet.co.nz)

## MEMORANDUM OF COUNSEL IN RELATION TO APPLICATION FOR DIRECTIONS AS TO SERVICE AND INITIAL ORDERS

May it please Your Honour:

### INTRODUCTION

- 1 The first plaintiffs and second plaintiffs have filed an application under the Trusts Act 2019 seeking Court approval of their respective decisions to give effect to a restructure of the Tauranga Electricity Consumer Trust (**TECT**) and the TECT Charitable Trust (the **2002 Charitable Trust**).
- 2 This memorandum is filed in support of the first and second plaintiffs' interlocutory application without notice for directions as to service and representation.
- 3 The first and second plaintiffs seek directions:
  - 3.1 in relation to service of the proceeding;
  - 3.2 appointing independent counsel to assist the Court in the proceeding; and
  - 3.3 for timetable orders which will see this matter progress to a hearing as efficiently as possible.

### Background

- 4 The relevant background to this proceeding is set out in Mr Holland's affidavit.
- 5 In brief, TECT is an energy trust, providing rebates to electricity customers of Trustpower Limited, and support for local initiatives, facilities and events, in the Tauranga and Western Bay of Plenty region. It was established in 1993, as part of the then electricity reforms, to hold a substantial shareholding in Trustpower, for the benefit of current and future electricity consumers. The 2002 Charitable Trust was established in 2002, and is a beneficiary of TECT.
- 6 TECT's income and capital is used to provide benefits to beneficiaries, who are defined as **Consumers**. In broad terms, Consumers are the customers of the current Trustpower electricity business within the TECT region.
- 7 TECT currently has approximately 49,000 Consumers.
- 8 In January 2021, Trustpower announced it was undertaking a review of its retail business. A likely outcome of that review is a sale by Trustpower of its retail business, and in late April 2021, Trustpower

advised the NZX that it was continuing to progress a sale with interested parties. That outcome would mean that TECT would no longer be able to be administered in a way that is consistent with its terms and objectives, including because the current retail and consumer customers of Trustpower's retail business would cease to be Consumers. Those who would benefit from TECT would decrease in number from the current 49,000 Consumers to a much smaller number of larger commercial and industrial electricity customers (approximately 150 Consumers).

- 9 As Mr Holland explains in his affidavit, the Trustees unanimously agreed that there is a need for TECT to change, whether or not a sale by Trustpower occurs.
- 10 The Trustees agreed on a preferred restructuring approach to put to Consumers including in the manner prescribed in the TECT trust deed (the **Consumer Consultative Procedure**). The proposed restructure would involve the Trustees of TECT and the 2002 Charitable Trust varying the terms of the TECT trust deed, establishing a new community trust, transferring significant assets to that new trust and winding up the 2002 Charitable Trust (the **Proposed TECT Restructure**).
- 11 The Consumer Consultative Procedure has now taken place.
- 12 By written resolutions on 22 April 2021, the Trustees of TECT and the 2002 Charitable Trust unanimously resolved to proceed with the Proposed TECT Restructure, subject to obtaining orders from the High Court approving those decisions.
- 13 In this proceeding, the first and second plaintiffs seek orders under the Trusts Act 2019 that it is proper and lawful for them to implement the Proposed TECT Restructure.

**Documents filed with this memorandum**

- 14 This memorandum is filed contemporaneously with:
  - 14.1 statement of claim, dated 13 May 2021;
  - 14.2 interlocutory application for directions as to service and representation, dated 13 May 2021;
  - 14.3 affidavit of Bill Holland, Chair of TECT, 13 May 2021; and
  - 14.4 consent memorandum from Jane Anderson QC, dated 12 May 2021.

### **DIRECTIONS SOUGHT**

- 15 Part 18 of the High Court Rules requires the first and second plaintiffs to commence this proceeding by filing a statement of claim accompanied by an application for directions as to service and representation under r 18.7.

#### **Service**

- 16 The directions sought as to service are to:
- 16.1 ensure that Consumers are made aware of the proceeding, have sufficient information to access the Court documents and understand how to take any formal steps they may wish to take; and
  - 16.2 enable any other party who may wish to be heard in the proceeding to access the Court documents.
- 17 There is no named defendant in the proceeding. Accordingly, the first and second plaintiffs seek a direction that no notice of proceeding is required. The first and second plaintiffs propose that procedural information (including all relevant information usually found on a notice of proceeding) will be made available to parties with an interest in the proceeding in the manner set out below.
- 18 The first and second plaintiffs propose to effect service by:
- 18.1 sending a notice (in essentially the same form as the draft notice attached to the affidavit of TECT Chairman, Bill Holland) to anyone who was a Consumer (as defined in the TECT Trust Deed) as at 28 January 2021, or who has since become a Consumer, explaining that the Trustees have filed an application to the Court for orders under section 133 of the Trusts Act 2019, with information on how Consumers can access online, download or request a copy of the documents filed in this proceeding, by way of:
    - (a) mail to those for whom TECT has a current postal address. TECT will use the database it uses for sending distribution payments to Consumers to mail the notice, as the primary line of communicating to Consumers about this proceeding; and
    - (b) email to those for whom TECT has a current email address. TECT has current email addresses for a subset of its Consumer database (about 37,600 of its 49,000 Consumers). Those Consumers who have provided a current email address will receive the notice by mail as set out above, as well as by email.

- 18.2 publishing a notice of the proceedings in the Bay of Plenty Times and the Weekend Sun (in essentially the same form as the draft advertisement attached to the Holland affidavit);
- 18.3 serving the Attorney General as is appropriate in respect of the second plaintiff (being a charitable trust under the Charitable Trusts Act 1957);
- 18.4 serving the counsel appointed as Independent Counsel by the Court; and
- 18.5 publishing all documents filed to date in this proceeding and a copy of the above notice to Consumers on TECT's website.

### **Representation**

- 19 The first and second plaintiffs seek directions regarding the appointment of an Independent Counsel in this proceeding.
- 20 The Independent Counsel's role would be to assist the Court by ensuring that a complete and balanced view is before the Court when determining this proceeding, including any relevant information and/or legal arguments in opposition to the orders sought by the Trustees. To the extent the Independent Counsel considers it appropriate in order to fulfil the role, the information put before the Court may include, for the Court's benefit, perspectives that contradict the Trustees' position that the proposed changes to TECT are lawful and proper exercises of their powers.
- 21 The first and second plaintiffs seek an order that Jane Anderson QC be appointed Independent Counsel on the terms set out in the application. Ms Anderson has signed a memorandum consenting to the appointment on those terms.
- 22 As part of the representation orders sought, Ms Anderson would be able, but not obliged, in her sole discretion, to seek information from TECT, seek and/or receive comments and information from Consumers, otherwise consult with Consumers, take expert advice, call evidence and cross-examine any witness.
- 23 In forming a view about the information and arguments that should be presented to the Court, Ms Anderson may, in her discretion, have regard to Consumers' submissions opposing the Proposed TECT Restructure. Ms Anderson will have the discretion to set her own protocols around engagement (if any) with Consumers.
- 24 Ms Anderson's reasonable fees and disbursements would be met out of TECT's assets.
- 25 The first and second plaintiffs submit the Independent Counsel process to be the most appropriate way to ensure that the Court is

properly presented with any information and argument that may contradict the plaintiffs' case.

- 26 Any Consumer or groups of Consumers may still appoint their own counsel to take steps on their behalf, should they wish to advance a specific argument in opposition to the proceeding.

**Timetable directions sought**

- 27 The first and second plaintiffs seek directions that:
- 27.1 initial disclosure is not required (as the affidavit is comprehensive);
  - 27.2 evidence is to be given by affidavit;
  - 27.3 any Consumer or the Attorney-General, should they wish to be heard, and any other person who seeks leave to appear, must file, and serve on the first and second plaintiffs, a notice of appearance or a statement of defence and, any affidavits on which they intend to rely by 2 July 2021;
  - 27.4 by 9 August 2021 the Independent Counsel must file and serve any evidence on which the Independent Counsel intends to rely at the hearing;
  - 27.5 by 23 August 2021 the first and second plaintiffs must file and serve any further evidence on which they intend to rely at the hearing; and
  - 27.6 the plaintiffs must file and serve their submissions no later than two weeks before the hearing;
  - 27.7 any other party, and Independent Counsel, must file and serve their submissions no later than one week before the hearing;
  - 27.8 the matter be set down for a full day hearing on the first available date after 20 September 2021 in order to hear the first and second plaintiffs' application for orders under section 133 of the Trusts Act 2019;
  - 27.9 leave be reserved for any party to seek a telephone conference if it appears necessary to adjust the timetable.

**Summary**

- 28 The first and second plaintiffs submit that the directions sought will help to secure the just, speedy and inexpensive determination of the proceeding.

Dated: 13 May 2021

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

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M D Arthur  
Solicitor for the plaintiffs