IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-485-000369
[2026] NZHC 1307

BETWEEN	STUART LEE ADAMS First Plaintiff
	QUALITY NZ HOMES LIMITED Second Plaintiff
	HENRY ADAMS LIMITED Third Plaintiff
AND	GREATER WELLINGTON REGIONAL COUNCIL Defendant
	LUKE CUNNIGHAM CLERE Third Party

Hearing:	30 April 2026
Appearances:	J Smith KC / T Lynskey for the Applicants/Third Party C Meechan KC / F P Divich for the Respondent/Defendant
Judgment:	14 May 2026

JUDGMENT OF ASSOCIATE JUDGE GELLERT

This judgment was delivered by me on 14 May 2026 at 4:30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Date ……..

Solicitors:
Stout Street Chambers, Wellington
Izard Weston, Wellington
Christine Meechan King's Counsel, Auckland
Heaney & Partners, Auckland

Introduction

[1] These proceedings were issued against the Greater Wellington Regional Council for negligently and maliciously initiating and conducting enforcement and criminal proceedings against the plaintiffs under the Resource Management Act 1991 in the Environment Court and District Court (**Enforcement Proceedings**). The Council has since settled with the plaintiffs on confidential terms.

[2] The Council seeks to recover the settlement amount it paid the plaintiffs (among other amounts) from the Council's lawyers, Luke Cunningham Clere (**LCC**), who has since been joined as a third party. Specifically, the Council's third-party claim against LCC alleges negligence and/or breach of retainer, with the Council saying it is entitled to recover the amounts sought because it relied on LCC's advice in issuing the Enforcement Proceedings and its settlement with the plaintiffs was reasonable.

[3] LCC now seeks an order that a preliminary question be determined in advance of the trial, which is now only between the Council and LCC. That is because the parties take fundamentally different views as to the necessary approach to be taken to determining the issues between them at trial:

(a) LCC say that the Council's claim will only succeed if the Council can establish that it was, or would have been, actually liable to the plaintiffs had the matter proceeded to trial as between the plaintiffs and the Council.

(b) The Council say that is not the case: it does not need to establish that it was actually liable to the plaintiffs to recover from LCC; it instead needs to establish that LCC is negligent and/or breached its retainer. If so, the settlement the Council reached with the plaintiffs will be relevant to the question of the quantum recoverable from LCC.

[4] While it is an interesting issue, I am not required to resolve it for present purposes. Rather, what I need to decide is whether it is appropriate that this issue be determined by way of a preliminary question in advance of trial.

Background

[5] The more fulsome relevant background to the application is as follows:

(a) The plaintiffs sued the Council for negligently and maliciously initiating and conducting the Enforcement Proceedings.[1] The Enforcement Proceedings related to a 12-lot rural residential subdivision undertaken in Whitemans Valley, Upper Hutt. The respondents included the plaintiffs (who undertook the subdivision), Upper Hutt City Council (which had approved the subdivision), and persons who had purchased lots in the subdivision. A key contention was whether 15 hectares of the site constituted a natural wetland, which required protection. The Council was wholly unsuccessful in the Enforcement Proceedings. A quote from the related decision as to costs is sufficient to explain matters:[2]

> The Court's decision setting out the above findings extended to some 94 pages. I will not endeavour to summarise it here. The comment that the … Council's application failed by a massive margin will be apparent to anyone considering the Court's decision.

(b) In June 2023, the plaintiffs commenced these proceedings. In response to these proceedings, the Council, while denying liability, alleged that any exposure it had arose due to the negligence of its own lawyers, LCC, who the Council has since joined as a third party.

(c) In June 2025, the Council settled the plaintiffs' claims for an amount less than the plaintiffs' claimed losses (**Settlement Sum**). The Council now seeks to recover from LCC an amount which comprises of the Settlement Sum, additional amounts paid by way of settlement to four other landowners,[3] indemnity costs paid to the Enforcement Proceedings parties, and costs paid to the Crown. No trial has been scheduled for the Council's claim against LCC.

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1 The Environment Court proceedings were issued against 11 identified respondents.
2 *Greater Wellington Regional Council v Adams & Ors* [2022] NZEnvC 83 at [6].
3 Who were also parties to the Environment Court proceedings.

(d) The Council says that it can recover the Settlement Sum if it proves that the Settlement Sum was prudent and commercially reasonable, and that it entered into the settlement in circumstances where it reasonably perceived there to be a real risk of liability arising from LCC's advice. Conversely, LCC says that the Council cannot recover the Settlement Sum unless it proves that the Council was in fact liable to the plaintiffs for the claimed amounts.

[6] LCC now seeks an order under r 10.15 of the High Court Rules 2016 (**HCR**) that the following preliminary question be decided in advance of the trial:

> [W]hether, in order to succeed on the [Council's] claim against [LCC,] the [Council] must establish that the [Council] was actually liable to the [plaintiffs] or would have been liable to the plaintiffs if this matter had proceeded to trial as between the plaintiffs and [the Council].

Rule 10.15 of the HCR

[7] Rule 10.15 of the HCR governs this Court's ability to order that a particular question be decided separately from other questions in the proceeding:

> **10.15 Orders for decision**
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> The court may, whether or not the decision will dispose of the proceeding, make orders for—
>
> (a) the decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) the formulation of the question for decision and, if thought necessary, the statement of a case.

[8] The starting point is the presumption that all matters in issue are to be determined in a single trial because this is normally the most expeditious and efficient way of dealing with a proceeding.[4] The party seeking an order under r 10.15 therefore

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4 *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010 at [10], citing *Clear Communications Ltd v Telecom Corporation of NZ Ltd* (1998) 12 PRNZ 333 (HC) at 334.

bears the burden of displacing that presumption.[5] Ultimately, however, the Court must assess the appropriateness of making an order under r 10.15 on a case-by-case basis.[6]

[9] In *Turners v Growers Ltd v Zespri Group Ltd*, this Court compiled the following list of the criteria that the courts have generally taken into account when considering whether to make an order under r 10.15:[7]

(a) The likelihood of delay in finally resolving the proceeding.

(b) The probable length of the hearings if there is a split trial.

(c) Whether a decision one way or the other on the separate question(s) would end the litigation.

(d) The impact on the length of any subsequent hearing.

(e) A balancing of the advantages to the parties and the public interest in shortening litigation against any disadvantages asserted by parties opposing a split trial.

(f) Demarcation difficulties in defining issues to be addressed at the first trial, and those left for the second.

(g) Resulting difficulties of issue estoppel.

(h) Inadvertent disqualification of a Judge who has expressed views at the first trial on matters for decision at the second trial.

(i) Inadvertent findings at the first trial upon matters that are for full evidence and argument at the second hearing.

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5 *Turners & Growers Ltd v Zespri Group* Ltd, above n 4, at [10].

6 *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC) at [46], citing *Clear Communications Ltd v Telecom Corporation of NZ Ltd*, above n 4, at 335 and *Turners & Growers Ltd v Zespri Group* Ltd, above n 4, at [13].

7 *Turners & Growers Ltd v Zespri Group* Ltd, above n 4, at [11].

(j) The need to recall some witnesses at the second hearing.

(k) The duplication of time involved in the Court and counsel "coming up to speed" again for the second hearing.

(l) The prospect of multiple appeals.

(m) The need for a second round of discovery or other interlocutory applications and amended pleadings following the first trial.

(n) Rostering difficulties in ensuring that the same Judge is available for the second hearing.

[10] In *Haden v Attorney-General*, this Court refined the above criteria into a practical five-question approach which asks the following:[8]

(a) Will there be difficult demarcation questions between those issues to be addressed at the first trial and those left to the second?

(b) Will the separate question bring the proceedings to an end?

(c) What potential time saving does the separate question offer (in respect of both hearing time saved and the potential delay to final resolution of the whole case, and any associated inefficiencies)?

(d) How will appeals be dealt with?

(e) Are there any other practical considerations tending one way or the other?

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8 *Haden v Attorney-General*, above n 6, at [50].

Discussion

The context of the preliminary question

[11] Both Mr Smith KC, who appeared for LCC, and Ms Meechan KC, who appeared for the Council, provided an interesting overview of the key authorities that would be relied on in relation to the issue captured in the proposed preliminary question. Although both counsel agreed on the applicable key cases[9] and relevant passages for consideration, they each drew different conclusions. The starting point from these cases is:[10]

> As a general rule, a judgment, award or settlement in proceedings between A and B does not establish the measure of B's loss in proceedings between B and C. As Gummow J put it in *Unity Insurance Barkers Pty Ltd v Rocco Pezzano Pty Ltd*, it is the policy of law to encourage settlement, but not at the expense of a third party's right of access to the courts.

[12] Mr Smith, on the one hand, submitted that the cases established that the Council would need to show that it was, or would have been, liable to the plaintiffs at trial. He worked through the causes of action pleaded by the plaintiffs against the Council (which were settled), being malicious prosecution, misfeasance in public office, defamation, and negligence.

[13] It was submitted to me that the Council would face real challenges at trial in establishing that it was liable or would have been found liable to the plaintiffs in relation to these claims. Mr Smith submitted that the fact of the Council's settlement with the plaintiffs alone was not a basis upon which it could found a claim against LCC.

[14] Mr Smith highlighted, by way of example, that the defamation claim was specific to Councillors and that LCC simply had no involvement in the alleged defamations. In other words, he submitted that there is no meaningful basis upon

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9 These cases include: *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314; *Fletcher & Stewart Ltd v Peter Jay & Partners* (1976) 17 BLR 38 (CA); *Unity Insurance Barkers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] 2 All ER (Comm) 1185; *Hotchin v New Zealand Guardian Trust Company Ltd* [2016] NZSC 24; and *Napier City Council v Local Government Mutual Funds Trustee Ltd* [2022] NZCA 422.

10 *Napier City Council v Local Government Mutual Funds Trustee Ltd*, above n 9, at [91] (footnote omitted).

which LCC could be found liable for a defamation claim against the Council. He pointed out that the settlement was global so there is no clear framework from which to apportion liability between the different causes of action and the settlement sums paid.

[15] Ms Meechan took a contrary view to the framing of the legal issues. She submitted that although the merits of the foreshadowed point are not always assessed at this stage, they should be assessed here as the case law that LCC relies on does not establish that the test of "actual liability" is the hurdle that must be cleared by a party in the Council's position.

[16] She submitted that the Council absolutely accepted that to succeed, it would need to establish that LCC was negligent and/or in breach of its retainer. Evidence would be called to prove that liability. Issues such as whether LCC could be found liable for negligence in relation to the plaintiffs' defamation allegation would be worked through in that context. But Ms Meechan disagreed with Mr Smith's submission that the cited cases establish the proposition that the Council needs to prove its own liability to the plaintiffs to be able to recover from LCC. She submitted that if the Council is successful in establishing LCC's negligence and/or breach of retainer, the issue of whether the amount paid to the plaintiffs by way of settlement is considered reasonable by the Court will go to quantum.

[17] The line of insurance cases appear to summarise Ms Meechan's position:[11]

> [107] … It is a sufficient rationale that such settlement is within the reasonable contemplation of the parties as a consequence of the insurer's breach of contract. This we take to be settled law. In *BNP Paribus v Pacific Carriers Ltd* Giles J summarised the position in this way:
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> > [187] At least where the insurer has breached the contract by denying liability, the weight of authority in the indemnity cases is that the insured can recover the amount of a reasonable settlement from the insurer ... This is consistent with the reasoning in *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* in that, on the application of principles concerning causation and remoteness in assessment of damages, settlement will commonly be causally related to the insurer's breach and a natural and reasonably contemplated result of the breach. As McHugh J said in *Unity Insurance Brokers Pty Ltd v*

[11] *Napier City Council v Local Government Mutual Funds Trustee Ltd*, above n 9 (footnotes omitted).

> *Rocco Pezzano Pty Ltd* at [33], "As a general rule, a contract breaker must be taken to have reasonably contemplated that its breach may force the innocent part[y] into litigation with third parties and that the innocent party may conclude that it is in its best interests to compromise the third party's claim".

[18] As to the reasonableness of a settlement amount:[12]

> [T]he law reports [have been described] as charts of the wrecks of unsinkable cases. Because of its uncertainty and expense, prudent parties usually try to avoid litigation where possible. It has to be borne in mind that the 'settlement value' of a claim is not an objective fact (or something which can be assessed by reference to an available market) but a matter of subjective opinion, taking into account all relevant variables. Often parties may have widely different perceptions of what would be a fair settlement figure without either being unreasonable. The object of mediation or negotiation is then to close the gap to a point which each finds acceptable. When a judge is considering the reasonableness of a settlement he will have in mind these factors and another: that he is likely to have a less complete understanding of the relative strengths of the settling parties then they had themselves (unless he is to embark on a disproportionately detailed investigation), and especially so in complex litigation. The issue which the judge has to decide is not what assessment he would have made of the likely outcome of the settled litigation, but whether the settlement was within the range of what was reasonable. If he decides that it was, an appellate court will not interfere with his decision unless persuaded that he erred in principle or (which is intrinsically unlikely) that his decision was incapable of justification on any reasonable view.

[19] I do not set out the legal principles or submissions any further because it is for the trial Judge to opine on the merits of the differing views of counsel and decide on the legal position. The main point I took from the overview of the case law was that the type of evidence that the Council will need to bring at trial to establish liability (if LCC's legal position is correct) would need to be comprehensive, and possibly even embarrassing, because, as Mr Smith submitted, the Council would need to call evidence to prove its own malicious prosecution.

[20] It follows that the outcome of the preliminary question could influence the content of the witnesses' evidence, cross examination, and the onus of proof. However, even accepting that this may be the case, the bigger issue is whether the complexity of the question is sufficient to justify an order under r 10.15 of the HCR.

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12 *Siemens Building Technologies FE Ltd v Supershield Ltd*, above n 9, at [28].

[21] I apply the usual considerations to determine that issue. Counsel were in agreement as to the framework for this analysis.

Will there be difficult demarcation questions?

[22] Mr Smith submits that there will be no difficulties in demarcation between the proposed preliminary question and the questions/issues to be determined at trial. He says, that, on the contrary, the conduct of the main trial would be clarified by answering the preliminary question for the reasons I have articulated.

[23] I agree that that the proposed preliminary question is discrete. However, in this case, I do not find that to be determinative one way or the other. This consideration is typically raised to consider whether there is a risk of different outcomes being caused by splitting the trial. I do not perceive that to be an obvious risk. In my view more weight should be given to the other factors in this case (which I discuss below).

Will determining the preliminary question bring the proceedings to an end?

[24] Mr Smith did not submit that determining the separate question would bring the proceedings to an end; it is accepted that it would not. He highlighted that r 10.15 of the HCR expressly contemplates that a question can be determined separately "whether or not the question will dispose of the proceeding".

[25] Instead, Mr Smith submitted that there is a possibility of settlement, depending on the answer to the proposed preliminary question, because the parties would be better informed. He explained that the Council, if it needs to establish its liability to the plaintiffs, might reassess its position if it involves proving liability for malicious prosecution and needs to call its own witnesses to say as much.

[26] Ms Meechan agreed that determining the separate question would not bring the proceedings to an end. She highlighted that determining the question would only be relevant to the issue of the settlement with the plaintiffs. However, she says that there is more in issue in this proceeding: the question of recoverability of indemnity costs; the Crown's costs; settlement sums paid to other parties (the purchasers of properties from the plaintiffs); and, finally, a further unresolved claim with another party.

[27] Where there is a meaningful prospect that a clearly defined question has the prospect of resolving matters between the parties, that weighs strongly in favour of making an order under r 10.15. Here, however, there is no real suggestion that this is the case — rather it is the efficient conduct of the trial which Mr Smith emphasised as being the main basis for the hearing of a preliminary question. Accordingly, the fact that there is no real prospect of resolution from determining the preliminary question is a factor that weighs against ordering a separate hearing.

What potential time saving does the separate question offer

[28] In addressing whether a separate question could save time (in respect of both hearing time saved, the potential delay to final resolution of the whole case, and any associated inefficiencies), I consider this matter together with a consideration of how any appeals would be dealt with, as they are related in this case.

[29] As to hearing time for the preliminary question, there was no real disagreement that it would likely take a day. That seems accurate as I was taken through the key authorities on the point in a half-day hearing.

[30] As to the trial time itself, following discussion with counsel, it became clear that no time saving would be made in relation to trial length from determination of the preliminary question. By way of a rough indication (for the purposes of this application and to which counsel are not held) it was estimated that the trial time might be two weeks or thereabouts.

[31] If heard in advance, Mr Smith submitted that although the trial length would not alter, the preliminary question would result in a better framework and so more efficient approach at trial: the relevant witnesses to be called and cross-examined would be clear; the onus and burdens would be better understood; and, consequently, there would be less risk of the trial stalling.

[32] Mr Smith submitted that any appeals would need to be determined in advance of trial. Ms Meechan submitted that, because the question would be important to the parties, it would likely be subject to appeal if it was determined separately rather than in the course of the trial, regardless of the outcome.

[33] Overall, it is apparent that there are no time saving efficiencies arising from the determination of a separate question as to hearing time. The only possible time saving to be made would be if the determination of the preliminary question prompted settlement. But I have already addressed this point. As to hearing time, the trial time will be unchanged. However, more of the Court's time would be required as it would need to allocate the initial fixture. It is understood that this can create scheduling issues where the same Judge is required for both the preliminary question and trial (which would be ideal). An additional judgment will be delivered, rather than the issue being resolved as part of the issues at trial.

[34] Ultimately, it seems inevitable that there would be delay to the overall resolution of the proceedings as any appeals were progressed. This factor weighs against a separate preliminary hearing.

Are there any other practical considerations tending one way or the other?

[35] Standing back, my view is that this is not a case where the high threshold for having a preliminary question determined is reached. While I understand that there may be some additional clarity to the parties as to the conduct of the trial, this possible clarity is materially outweighed by the potential adverse impacts. Specifically, there is no tangible prospect of it prompting resolution; the determination of the matter is likely to take longer overall (particularly where there is a reasonable prospect that the determination of the preliminary question will be appealed); the use of additional Registry and judicial resources may be required; and importantly the legal question for consideration will only address some of the matters required to be determined at trial.

[36] I have considered and understand the frustrations that may be faced by LCC in relation to the question of the appropriate onus and clarification of the tasks at trial. But, in the end, the framing of the claim is a matter for the Council. LCC has been clear about its view that the Council needs to establish that it would have been liable at trial to the plaintiffs in order to succeed in its third-party claim against LCC. If the Council chooses to disregard that position, and LCC is proven right, then, as Ms Meechan submits, the Council may lose. In the end, that is a risk for the Council.

Result

[37] The application is declined.

[38] Counsel agreed that costs would follow the event on a category 2B basis with an allowance for second counsel. Because the respondent is successful, it is entitled to costs. Accordingly, I award costs to the Council on a category 2B basis with an allowance for second counsel, and disbursements as fixed by the Registrar.

Associate Judge Gellert