

**IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY**

CIV 2008-488-548

BETWEEN	TE WHANAU O RANGIWHAKAAHU HAPU CHARITABLE TRUST First Plaintiff
AND	FRIENDS OF MATAPOURI INC Second Plaintiff
AND	THE DEPARTMENT OF CONSERVATION First Defendant
AND	THE CHIEF EXECUTIVE, LAND INFORMATION NEW ZEALAND Second Defendant
AND	THE ATTORNEY GENERAL Third Defendant
AND	V M MONK, T M RINGER, J R RINGER, W G BRUMBY AND J K RADLEY Fourth Defendants

Hearing: 11 May 2009

Appearances: S Henderson for plaintiffs
G Gardner for first, second and third defendants
D McLellan for fourth defendants

Judgment: 8 July 2009

JUDGMENT OF ALLAN J

*In accordance with r 11.5 I direct that the Registrar endorse this judgment
with the delivery time of 4 pm on Wednesday 8 July 2009*

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TE WHANAU O RANGIWHAKAAHU HAPU CHARITABLE TRUST And Anor V THE DEPARTMENT OF
CONSERVATION And Ors HC WHA CIV 2008-488-548 [8 July 2009]

[1] This is an application by the fourth defendants for review of a decision given on 23 December 2008 by Robinson AJ, in which the fourth defendants' application for security for costs against the plaintiffs was declined.

Review principles

[2] It is common ground that the application for review is to be determined under the former r 61C, the application for review having been filed on 20 January 2009, before the current High Court Rules came into force.

[3] The defendants' application for review is brought in reliance upon s 26P(1) of the Judicature Act 1908. Rule 61C(4) provides that any such review proceeds as an appeal by way of rehearing if the order or decision was made following a defended hearing and is supported by recorded reasons. That is the situation here. The burden is on the defendants to establish that the Associate Judge's decision was wrong: *Midland Metals Overseas Pte Ltd v Christchurch Press Co Ltd* (2002) 16 PRNZ 107.

[4] The appellate approach does not impose a straitjacket upon the reviewing Judge but the presumptive force of the Associate Judge's decision in cases such as the present, where there was full argument before the Associate Judge and his judgment is closely reasoned, must be considerable: *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481 at 485. To the extent that the decision involved the exercise of a discretion, the defendants, in order to succeed, must show that the Associate Judge acted on a wrong principle or that he failed to take into account some relevant matter or took into account some irrelevant matter, or was plainly wrong: *Alex Harvey Industries Ltd v Commissioner of Inland Revenue* (2001) 15 PRNZ 361, *Ikon Graphics Ltd v Holmden Horrocks* [1997] 3 NZLR 738 and *Ophthalmological Society of NZ Inc v Commerce Commission* [2003] 2 NZLR 145.

Factual background

[5] The fourth defendants are registered as proprietors of a significant area of land at Matapouri. Their land abuts a Crown reserve.

[6] The first plaintiff is a charitable trust registered under the Charitable Trusts Act 1957, formed to advance the interests of descendants of Rangiwakaahu. The ancestors of Rangiwakaahu formerly owned much of the Maori land at Matapouri.

[7] The second plaintiff is an incorporated society registered under the Incorporated Societies Act 1908. It was recently formed in order to represent and advance the interests of persons concerned with the protection of the historical, culture and natural environment of Matapouri and its associated coastal areas, which include the Otito Scenic Reserve. It is upon that reserve, and the question of its proper boundaries, that this case is focused.

[8] The plaintiffs seek declaratory and other relief aimed at securing a disputed area of land (comprising a little over 1 hectare) for the first plaintiff. There is also a claim for damages of \$11 million, although Mr Henderson concedes that the monetary claim is not soundly based, at least in its present form. Indeed, the plaintiffs' aim is now said to be to have the land transferred to the first defendant, to form part of the scenic reserve.

[9] The first three defendants are respectively the Department of Conservation, the Chief Executive of Land Information New Zealand, and the Attorney General, who is sued in respect of the Crown's responsibilities under the Treaty of Waitangi.

[10] The plaintiffs claim relief against those defendants, but not against the fourth defendants, who were not initially joined in the proceedings. They became parties on their own application, without opposition from the plaintiffs.

[11] A fundamental issue raised in the proceeding is whether a boundary shown on deposited plan 199214 is correct. The plaintiffs' case in essence is that an error was made by surveyors instructed by the fourth defendants in 1999 during the course

of a survey carried out for the purposes of undertaking a planned residential subdivision. The plaintiffs allege that the error has been carried through into documents registered under the Land Transfer Act, with the result that the fourth defendants have wrongly become registered as proprietors of land to which they have no right.

[12] The parties have agreed to the determination of preliminary questions, namely:

- a) is the boundary between the Otito Reserve and the adjoining land defined correctly in deposited plan 199214; and
- b) if the boundary defined between the Otito Reserve and the adjoining land on DP199214 is incorrect, where is the location of the correct boundary between the two parcels of land.

[13] As yet no date has been allocated for the argument on the preliminary questions. Answers to those preliminary questions will not necessarily be determinative of all issues in the proceeding, because the fourth defendants have pleaded affirmative defences of adverse possession and limitation.

[14] Before Robinson AJ the fourth defendants argued that security should be ordered on a staged basis, covering in the first instance costs likely to be incurred up to and including the determination of the preliminary questions, with a right of review thereafter.

The fourth defendants' contentions

[15] Mr McLellan contends that in the course of exercising his discretion, Robinson AJ erred by:

- a) reaching a view on the likely merits of the proceeding that was based on false or unsubstantiated factual material, and which accorded

insufficient weight to factual matters which tended to favour the fourth defendants;

- b) wrongly concluding that this was genuine public interest litigation, and placing undue weight on that factor;
- c) giving undue weight to the existence of a cross-claim by the first defendant, the Department of Conservation, against the fourth defendants, and in particular wrongly considering the existence of the cross-claim to add weight to the merits of the plaintiffs' claim against the fourth defendants;
- d) according undue weight to access to justice principles, without paying adequate attention to the fourth defendants' presumptive entitlement to recover costs against the plaintiffs if successful in their defence.

Discussion

[16] The plaintiffs concede that the threshold test of impecuniosity under the old r 60 is met, in that the plaintiffs, although able to fund their own lawyers, are not in a position to meet an order for security for costs. Accordingly, the Court is required to consider whether, in the exercise of its discretion, and in the light of all the circumstances of the case, it is proper to make an order for security: *Hamilton v Papakura District Council* (1997) 11 PRNZ 333 at 335-6. That determination is to be made on a careful assessment of the circumstances of the particular case: *A S McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747. There is no predisposition towards either the grant or refusal of an application: *Bell-Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457 at 460.

[17] As a general rule, an order for security for costs that would prevent a plaintiff from bringing a genuine claim will be made only after careful consideration and where the claim has little chance of success. The Court must be astute to protect a defendant from unjustified litigation (especially where it is overly complicated or unduly protracted): *McLachlan* at [15]-[16]. The Court is therefore obliged to

consider the merits of the case, insofar as they can be assessed at the time of the application: *Meates v Taylor* (1992) 5 PRNZ 524.

[18] Mr McLellan asks this Court on review to take a different view of the merits from that reached by the Associate Judge. He argues that the Associate Judge's view of the merits is vulnerable to challenge in three respects. First, counsel contends that the Judge was wrong to say that:

... it was significant that the first, second and third defendants all admit that the deposited plan prepared by Reyburn & Bryant being LT199214 was incorrect.

[19] As Mr McLellan points out, the Surveyor General's position is that he was "not sufficiently convinced that DP199214 was in error". Further, the first defendant, the Department of Conservation, denies the plaintiffs' allegation that the survey plan was wrongly drawn. In essence, it adopts the Surveyor General's position. The Department of Conservation has taken no step in its own right to correct the error alleged by the plaintiffs, despite having had other opportunities to do so.

[20] Mr McLellan argues that the Judge ought therefore to have concluded that, on balance, the merits rested with the fourth defendants rather than the plaintiffs.

[21] This aspect of the fourth defendants' challenge effectively rests upon the position adopted by the Crown defendants. In that respect, Ms Gardner, counsel for those defendants, filed a memorandum for the purposes of the review hearing in which she explained that:

... The Surveyor-General is the statutory officer charged with making decisions as to whether there is an error in the cadastral survey data set affecting any title under the Land Transfer Act 1952. Once the Surveyor-General had made a decision under s 52 of the Cadastral Survey Act 2002 regarding DP 199214, that decision then became the view of the Crown defendants.

Further, by its Statement of Claim against the fourth defendants (dated 14 November 2008) the first defendant alleges only that the crucial question regarding whether or not the Crown defendants are found liable to the plaintiffs as claimed is the correct boundary between the Otito Reserve and the adjoining land. On that basis, the first defendant alleges that there is

between it and the fourth defendants the unanswered issue of the correct boundary between the reserve and the adjoining land.

[22] From this explanation it is possible to ascertain the true position of the Crown defendants for the purposes of the plaintiffs' claim. All three defendants simply adopt the stance that, once the Surveyor General has made a decision as to the correctness of the survey and the procedures adopted in connection with it, then that decision becomes the view of all Crown defendants.

[23] But it is evident from the pleading of the first three defendants that they regard the correctness of the plan as an issue for the final determination of the Court.

[24] I accept that at a technical level the Associate Judge was incorrect to say that all remaining defendants admit the incorrectness of the Reyburn & Bryant plan, but having said that, this first factor is largely subsumed in the second issue upon which Mr McLellan relies, namely the wider merits of the plaintiffs' claim.

[25] As to those merits, the Judge said:

At this stage, it is not possible to do more than assess an impression of the merits of the plaintiffs' claim which cannot be a definite indicator of the ultimate outcome after trial. However, it is significant that the first, second and third defendants all admit that the deposited plan prepared by Reyburn & Bryant being LT199214 was incorrect. Furthermore, evidence adduced by the plaintiff discloses the area of land contained in the certificate of title issued to the fourth defendants following deposit of the plan showed an increase of area of just over one hectare from the area of land contained in the title issued to the fourth defendants which was cancelled on the issue of the new certificate of title. There appears to be no explanation as to how the fourth defendants' title became entitled to the benefit of an increase in area of land to this extent.

[26] Mr McLellan argues that the Judge ought not to have drawn any inference adverse to the fourth defendants from the absence of an explanation on their part as to how they appear to have become entitled to the benefit of an increase in the area of their land. He contends that the survey approved, at least in the first instance, by the Surveyor General, should be accorded primary weight, particularly when the Surveyor General has declined to alter his position as to the correctness of the survey.

[27] I disagree. In my view the Associate Judge was perfectly entitled to place some considerable emphasis upon the absence to date of an explanation by the fourth defendants of the circumstances in which the boundary, apparently established in 1877 and later confirmed in 1893, 1966 and 1976, has now arguably moved.

[28] The essential issue for present purposes is that the plaintiffs' claim does not appear to lack substance. There is a genuine issue to be determined, and so this is not a case in which an impecunious plaintiff seeks to mount a speculative and insubstantial proceeding.

[29] Mr McLellan's third point concerns the Judge's observation that the cross-claim by the Department of Conservation against the fourth defendants adds weight to the overall merit. This is, in my view, an issue of less significance but I agree with Robinson AJ that the existence of the cross-claim is relevant in the sense that it reflects the first defendant's acceptance that a possible outcome of the proceeding is that the plaintiffs might succeed. The Associate Judge was correct to conclude that the plaintiffs' claim has sufficient substance to fall outside the category of meritless claims referred to in *McLachlan*.

[30] Mr McLellan's second argument relates to the Judge's characterisation of the proceeding as of significant public interest, albeit with an element of private interest to the extent that plaintiffs seek damages. The Court is reluctant to make an order for security for costs if the result will be to stifle litigation brought in the public interest: *Ratepayers and Residents Action Assn Inc v Auckland City Council* [1986] 1 NZLR 746 at 750; *Friends of Turitea Reserves Society Inc v Palmerston North City Council* HC PMN CIV 2006-454-879 23 February 2007.

[31] In support of this aspect of his argument, Mr McLellan refers to the existence of a very substantial claim by the plaintiffs for general damages, and of their prayer for an order for return of the disputed land to the first plaintiff. Such claims are, he contends, inconsistent with any argument that this is genuine public interest litigation, particularly where the Department of Conservation itself has taken no step to recover land to which it is arguably entitled.

[32] I consider that the Judge was right to classify the claim as genuine public interest litigation. The second plaintiff stands to gain nothing tangible from the outcome of the proceeding. The claim for damages by the first plaintiff suggests an element of private litigation, but that will not be determinative: *Turitea* at [56]. However, it appears from Mr Henderson's advice to the Court that the first plaintiff's claim for damages will not proceed, at least in its present form. He accepts that if the plaintiffs succeed, then the disputed land will revert to the Crown as scenic reserve, despite the current prayer for relief which seeks an order vesting the land in the first plaintiff. Mr Henderson also advises that the first plaintiff's claim for damages will be limited to "compensation for the insult to the mana of the Hapu for the desecration of their wahitapu beyond the date when they agreed to Molly Morrison having the right for her life to occupy the land". Molly Morrison is an ancestor of the fourth defendants.

[33] In essence the plaintiffs will seek to have the Court declare the land to be scenic reserve, rather than part of the fourth defendants' property. In my view, a claim of that sort constitutes public interest litigation and the Judge was right to regard it in that way.

[34] Mr McLellan maintains that the Judge has over-emphasised the importance of the plaintiffs' entitlement to access to justice. I disagree. As is emphasised by the Court of Appeal in *McLachlan*, an order will not ordinarily be made if to do so will effectively determine the proceeding against the plaintiff, unless the claim lacks substance. In the present case the Judge was correct to stress the importance of access to justice principles.

[35] Two further points taken by Mr McLellan require only brief attention. First, he is critical of the Judge's reference to the possibility that if they succeed, the fourth defendants may be able to recover costs against the first defendant on that party's cross-claim. That is at least a theoretical possibility. The Judge was entitled to take it into account.

[36] The second point is concerned with the scope of the proceeding, which Mr McLellan criticises as "massively over-complicated". In that respect he is

presumably referring to several voluminous affidavits which have been filed on behalf of the plaintiffs. I express no view as to the contents of those affidavits. It is, however, important that some shape and organisation has been brought to the proceeding in recent times. The parties are agreed as to the formulation of questions for determination prior to trial. There is now a considerable degree of focus in the proceeding.

[37] Neither of Mr McLellan's final points are of any great significance for present purposes.

Conclusion

[38] In my view, while it may be possible to cavil at one or two aspects of the Associate Judge's judgment, his decision to refuse the fourth defendants' application for security for costs was plainly open to him. The outcome accords with the conclusions reached in several recent public interest cases, including *Save Happy Valley Coalition Inc v Minister of Conservation* HC WN CIV 2006-485-1634 18 September 2006, to which the Associate Judge referred in his judgment.

[39] It is not without relevance that the fourth defendants became parties to this proceeding on their own application. It would be a somewhat curious outcome if they were now to obtain what amounted to a stay by obtaining an order for security for costs which the plaintiffs are unable to satisfy.

Result

[40] The fourth defendants' application for review is dismissed. The plaintiffs are entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J

