IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 190
ARC 62/12

IN THE MATTER OF	an application for leave to file challenge out of time
BETWEEN	ABC01 LIMITED (FORMERLY PRIMARY HEART CARE LIMITED) Plaintiff
AND	HOWARD DELL Defendant

ARC 65/12

IN THE MATTER OF	an application for compliance order
BETWEEN	HOWARD DELL Plaintiff
AND	ABC01 LIMITED (FORMERLY PRIMARY HEART CARE LIMITED) Defendant

Hearing: 6 November 2012
(Heard at Auckland)

Appearances: Tane Rakau, agent for ABC01 Limited
Howard Dell in person

Judgment: 6 November 2012

Reasons: 12 November 2012

REASONS FOR INTERLOCUTORY JUDGMENT
OF CHIEF JUDGE G L COLGAN

---

[1] These are the Court's reasons for declining to uphold the case of ABC01 Limited that the Court is without jurisdiction in these proceedings on what might be called, in short-hand, Maori sovereignty grounds.[1] As I noted, albeit in summary, Mr Rakau's wide-ranging oral submissions to the Court on this point, these are as follows.

[2] ABC01 Limited says it has come under the 'protection' of Ngai Tupango Incorporation (Ngai Tupango). Just when that occurred Mr Rakau could not say and there was no evidence on the point, although it seems clear that by the time of the Employment Relations Authority's investigation meeting, Ngai Tupango was representing the company. When I asked Mr Rakau whether Ngai Tupango's protection of ABC01 Limited was retrospective from the date of its agreeing to afford the company that status, and in particular to include the period of Mr Dell's association with the company before he issued proceedings, Mr Rakau could not say.

[3] Mr Rakau's submissions include that all civil obligations and rights in present day New Zealand are, or are derived from, a bundle of rights exercisable in relation to land, and that Ngai Tupango, as tangata whenua, has mana whenua in respect of those persons (including inanimate corporations such as ABC01 Limited) who seek and are given its protection. Mr Rakau likened the position of the New Zealand Employment Court purporting to make orders about employment relationships in New Zealand affecting such a protected party (in effect Mr Dell's position), to the inability of New Zealand courts to make orders affecting a company in Germany which has no connection to New Zealand (the company's position). Applicable particularly in this case, also, was Mr Rakau's submission that the New Zealand Government has no power to issue passports or other immigration status documents which may have purported to allow Mr Dell to come to and work in New Zealand, so that these considerations, among others, affecting the case are solely the preserve of Ngai Tupango's Native Assessors Tribunal.

[4] Mr Rakau submitted that Mr Dell must apply first to the Maori Land Court under the Te Ture Whenua Maori Act 1993 as the proper way of bringing his case within the jurisdiction of Ngai Tupango's Native Assessors Tribunal where the rights

[1] [2012] NZEmpC 188.

and obligations of the parties should be determined. Including ABC01 Limited as being within the category of "our people", Mr Rakau submitted that the case must be decided according to native customary title and it was "too late" for the Parliament of New Zealand to enact laws including, I assume, the Employment Relations Act 2000. Mr Rakau submitted that Queen Victoria introduced British law to protect Maori as tangata whenua although, Mr Rakau submitted also, "We are all Maori – all spiritual people".

[5] Mr Rakau invoked s 25 of the Crimes Act 1961 to say that Mr Dell's ignorance of the law is no excuse for his wrongful pursuit of his claims to justice in this Court (and I assume the Employment Relations Authority). However, as Mr Dell pointed out and ironically, the company itself invokes ignorance of the law as its excuse for purporting to file its challenge in the Employment Relations Authority rather than, as provided by statute, in this Court. In any event there is no connection between a criminal law exclusion of a potential defence to criminal law proceedings, and Mr Dell's claims to remedies for breach of an employment agreement.

[6] Shortly after the hearing adjourned on 6 November 2012, Ngai Tupango filed by facsimile several documents affecting the case which I have read and considered but which do not change my decision on this issue. The first is an "Interlocutory Injunction Order to Her Majesties Queens Employment Court of New Zealand for Enforcement" purportedly made pursuant to ss 2 and 5 of Te Ture Whenua Maori Act 1993 requiring the "Ministry of the New Zealand Company of Parliament" to "quit and give up possession to the Lands", I assume of Aotearoa/New Zealand. This "Order", which purports to have been made on Friday 2 November 2012, does not refer at all to this proceeding except in its entituling.

[7] Filed at the same time is what is described as a "Trespass Order", also purportedly made by Te Kooti Marae of "Ngai-Tupango-Hapu: Incorporation" on 2 November 2012. Again, with the exception of the entituling which bears a resemblance to that in these proceedings, these orders do not appear to relate directly to Mr Dell or the case before this Court.

[8] Finally, filed at the same time is what is described as a "Vesting Order" which, although again referring peripherally to ABC01 Limited and its John-William Hinchcliff, does not appear to address directly the case before this Court other than purporting to assert Maori sovereignty generally.

[9] I have been assisted in my decision of these issues by a recent judgment of Heath J in the High Court, *R v Mason.*[2] Although a criminal law case, it refers to and draws on a broader jurisprudence about Maori sovereignty and the New Zealand Parliament's legitimacy. In *Mason* the issue was whether there is now a parallel alternative criminal law jurisdiction based on Maori custom that is available to Maori so that serious allegations of criminal offending can and should be determined in that forum. Where the argument in *Mason* intersects with that which I understand Mr Rakau has advanced in this case, is the assertion that relevant customary law can only have been extinguished with the consent of Maori and has not been. Associated with this was the contention in *Mason* that Maori customary law (tikanga maori) continues to operate as a source of law in its own right and that it has not been extinguished (with the necessary consent of Maori) by unequivocal statutory language.

[10] Heath J described[3] the argument thus:

> By accepting Parliament's ability to pass legislation that could, within those confines, remove the availability of a tikanga approach, Ms Sykes has articulated a more nuanced approach to the jurisdictional issue than has been raised in earlier cases. To date, the orthodox approach has been to reject any objection to the jurisdiction of trial Courts, on (what have been termed) "Maori sovereignty" grounds, as "plainly unsound legally".[4]

[11] The *Wallace* judgment of the Supreme Court referred to in the footnote was an unsuccessful attempt to challenge the judgment of Brewer J in the High Court in *R v Wallace.*[5] Brewer J held at [5] and following:

> [5] The law is that Parliament has sovereign power to legislate. The Crimes Act 1961, the Arms Act 1983 and the Evidence Act 2006 are examples of

---

[2] [2012] 2 NZLR 695; [2012] NZHC 1361.
[3] At [8].
[4] For example, see *Wallace v R* [2011] NZSC 10 at [2].
[5] HC Auckland CRI-201-092-2879, 11 October 2010.

> legislation enacted by Parliament. They apply to all persons present in New Zealand.
>
> [6] The same or similar arguments as those advanced by Mr Wallace have been rejected by the Courts in New Zealand on numerous previous occasions. A summary of the relevant authorities can be found in *R v McKinnon*.[6] The decisions of the Court of Appeal in *Knowles v Police*,[7] *R v Mitchell*,[8] *R v Harawira*[9] and *R v Toia*[10] can be cited in this context. An example of the dicta consistently set out in these cases is the following passage from *R v Harawira*, per Chambers J:
>
>> [8] The principal ground of appeal remains as it was before Nicholson J. Mr Harawira stated the question to be "whether Parliament is sovereign". Mr Harawira expanded on that argument at some length. In essence, it is his position that Maori never ceded sovereignty, with the consequence that Parliament's right to enact laws is "a fiction constructed for convenience". Mr Harawira describes the concept of the sovereignty of Parliament as "a fabrication based on pretence". This challenge to sovereignty has frequently been raised by Maori in recent cases in the High Court and this court. This court has repeatedly said that it is not an issue which can be addressed and resolved by the courts: see, by way of example, *Knowles v Police* CA146/98 12 October 1998 and *R v Mitchell* CA68/04 23 August 2004. As was said in both those cases, the issues which Mr Harawira seeks to raise are matters "for public and political processes and not for judicial ones".

[12] In *Mason* the High Court concluded that it is now generally accepted that at the time of the Declaration of Independence in 1835 and the signing of the Treaty of Waitangi in 1840, existing customary practices had "the character and authority of law". This was contrary to some contemporaneous jurisprudence including *Wi Parata v Bishop of Wellington.*[11] Relying on the current oath of office of High Court Judges (the same as the oath of office taken by Judges of the Employment Court), Heath J concluded that the 1873 oath of office of Supreme Court (now High Court) Justices, including the need to take into account "the laws and usages of New Zealand", probably referred to those of Maori than those of much more recently arrived European settlers. This, Heath J concluded, was supported by the use of the same term in s 71 of the New Zealand Constitution Act 1852 (Imp).

[13] The High Court concluded that the Imperial Parliament recognised that there were pre-existing "Laws, Customs and Usages" of Maori that should be given effect

---

[6] (2004) 20 CRNZ 709 (HC).
[7] CA146/98, 12 October 1998.
[8] CA68/04, 23 August 2004.
[9] CA180/05, 1 August 2005.
[10] [2007] NZCA 331.
[11] (1877) 3 NZJur (NS) 72 (SC).

so that: "The existence of s 71, until repealed by the New Zealand Constitution Act 1986, demonstrates that those responsible for governing the colony in its early days accepted the existence of legal norms that were followed by Maori".

[14] The High Court accepted that cases such as *Attorney-General v Ngati Apa*[12] had acknowledged the existence of Maori customary title to land as an aboriginal right and, in *Takamore v Clarke*,[13] also customs associated with the burial of a deceased.

[15] Following the judgment of the High Court (Randerson J) in *Barrett v Police*,[14] Heath J in *Mason* concluded that by passing the Crimes Act 1961, Parliament had enacted legislation conferring exclusive powers to try crimes in the courts that it created. It followed that the customary system had been extinguished. So, Heath J concluded:[15] "It is not possible to regard the customary system as an existing parallel system."

[16] The earlier judgment of the High Court in *Barrett* is even more precisely on point for the decision of this case as argued for by Mr Rakau. In *Barrett* there were two broad challenges to the Court's powers or jurisdiction. The first one was that the New Zealand Parliament was unconstitutional and its laws invalid. The second was that Parliament and the courts created under various constitutional instruments had no authority over Maori. Randerson J's reasoning was that since the adoption of the Statute of Westminster 1931 (Imp) in 1947, the New Zealand Parliament has had full and exclusive power to legislate in New Zealand. Today, that power to legislate springs from the Constitution Act 1986 so that the statutes at issue in that case (the Land Transport Act 1998 and the Bail Act 2000) were passed validly by the New Zealand Parliament. Randerson J held:

> This court's duty is to apply enactments made by the legislature: *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC) and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 690.

---

[12] [2003] 3 NZLR 643 (CA).
[13] [2011] NZCA 587; [2012] 1 NZLR 573.
[14] HC Hamilton CRI-2003-419-64, 14 June 2004.
[15] At [37].

[17] Addressing the argument in *Mason* that the customary system could only be extinguished with both the consent of Maori and the use of clear and plain statutory language, Heath J concluded that once it is accepted that a society is authorised to properly constitute a parliament to legislate (a proposition not challenged in that case), no further consent is required for a statute enacted by the Legislature to extinguish a pre-existing customary right. The High Court accepted that "clear and plain" statutory language was required to extinguish such a right but, agreeing with Elias CJ and Tipping J in *Ngati Apa v Attorney General*,[16] the Judge considered that it may be done either "by express words" or at least by necessary implication[17].

[18] The company's argument in this case of absence of jurisdiction resembled a less sophisticated position than was advanced before the High Court in the *Mason* case. As noted, it resembles more the position taken in *Barrett*. It is, in essence, one which says that the Parliament which enacted the Employment Relations Act 2000 was not competent to do so because sovereignty had not been ceded to it by tangata whenua.

[19] Another difference between this, and indeed most of the cases in the same area, is that whilst those claimants sought to insulate an individual defendant from prosecution and/or sentence at criminal law, in this case a limited liability company asserts a recently sought and granted protective status insulating it from any requirement to comply with parliamentary statute law. The principle upon which *Barrett* was decided applies equally to this case however. I simply observe that quite how the Te Ture Whenua Maori Act 1993 is applicable to this dispute, yet another statute passed by Parliament exercising the same constitutional powers (The Employment Relations Act 2000) is not, was not explained by Mr Rakau. It is difficult to reconcile logically the company's two positions. But even if the Te Ture Whenua Maori Act is not applicable (as I accept it is not), there is not a legislative void in which Ngai Tupango's Native Assessors Tribunal assumes sole jurisdiction over this case to the exclusion of the Employment Court as the company asserts.

[16] [2003] 3 NZLR 643 (CA) at [34] and [185].
[17] At [35]

[20] Based on the foregoing authorities which I accept as applicable to New Zealand legislation and courts, I have concluded that the Employment Relations Act 2000 was validly enacted by the New Zealand Parliament and is the law that is applicable to the dispute between these parties in this Court. The Employment Court is seized lawfully of this proceeding.

GL Colgan
Chief Judge

Judgment signed at 4.15 pm on Monday 12 November 2012