

MAORI APPELLATE COURT : APPEAL 1993/1 and 3

At Rotorua - Wednesday, 18 August 1993

Present - Judge A D Spencer (Presiding)
- Judge G D Carter
- Judge J L Rota

Mr Charters - Counsel for Appellant
Mr Innes - Department of Survey and Land
Information
Mr Temara - Rotorua District Council

ARATAUA NO 4C and PARAWAI 1B2

Judge Spencer: Right well gentlemen, this matter we've given directions on as to address certain procedural matters and I now hand it over to you Mr Charters to introduce your case for this afternoon on those procedural matters, thank you Mr Charters.

Mr Charters: Yes Sir, all of the directions as to service of the documents have been completed. Unfortunately I haven't filed an affidavit of service in that regard but I can assure the Court that all of the notices have been sent to the appropriate people as had all of the other documentation been sent by the Court itself to those people and those people have been notified. Right throughout Sir, we have really not had any submissions from DOSLI or the Chief Surveyor or the District Council objecting to the procedures that we have undertaken and indeed Sir, the original application, Judge Smith made sure that all of those people were also notified as to this application being brought forward.

Judge Spencer: Can you just elaborate on that for a moment Mr Charters, because I actually made an inquiry about this in April from the Court staff as to what notice was given prior to the first hearing on 10 September 1992, whether the Regional Council received notice and a copy of the application.

Mr Charters: I understand that they had Sir, that was my understanding at the hearing of the original application that similar parties to those who we have notified this time were also notified on the last application, and in actual fact the prior application to this application being brought before Judge Smith was an application by the Arawa Trust Board who were also made aware of

Mr Charters

this application and it was one of those matters which we did want them to be made aware of as applications have been made through the Waitangi Tribunal for the matter of compensation with effect of the Rotorua lakes and this one matter that we really felt, in saying that, I mean the Arawa Trust Board and Ngati Whakaue and the associated tribes wanted to dispose of and these matters concerning accretion and such like and how they should be affected and having a decision of this Court to make it clear as to the rights and determination of owners with respect to accretion and the Crown's interests.

Judge Spencer: Can I just stop you there for a moment. This is an important point. I wrote to the Registrar of the Court here in Rotorua on 13 April this year and received a reply dated 20 April. The reply reads - 'my perusal of the application files shows that notice of the hearing on 10 September 1992 was only sent to the applicant, Ron Phipps. No directions as to notice were given by the Court and the only other way the application was advertised was in the Court's panui'. Now, I see from the minutes of the hearing on 10 September that you mentioned the Arawa Trust Board, as you say, as having an interest in this in the way that you just mentioned but have you got any formal evidence of the notice that has been given to the Regional Council, the District Council, to neighbours, to other Government agencies.

Mr Charters: Of the notices that we

Judge Spencer: Of the original hearing, the Lower Court application.

Mr Charters: No, we weren't asked to serve any of those applications.

Judge Spencer: Prior to the Lower Court hearing.

Mr Charters: At the Lower Court hearing. But in saying that the Arawa Trust Board and DOSLI and all of the appropriate City Council had been made aware because a number of them were actually attendant at that prior hearing. Judge had made it quite clear that on the Arawa Trust Board application which the applications were Counsel Grattan O'Sullivan on behalf of the Arawa Trust Board. The matter of these applications was brought to their notice and that these were proceeding after their application. The reason why the Arawa Trust Board's application was brought forward with respect to determination as to ownership of customary land etc, was that it had been in an application before the Court for some five or six years and Judge Smith wanted to determine whether they wanted to continue with that application or not and they said at that meeting they did not and that is in the minute prior and I think in actual fact a lot of the notices with respect to



that may well have gone out with the Arawa Trust Board application notice, because they were set down on the same day and they were set down at the same time.

Judge Spencer: Can I just ask you whether or not the informal notification you've described would cover for example the other owners of the two blocks concerned, the adjoining blocks in both cases and all the Government agencies, local authorities as well as the Trust Board.

Mr Charters: I think the only persons that I could say were those who were there. I think one was DOSLI and one was the City Council and one was the Arawa Trust Board, so I think there's only really the three that I could say that applied to. The other two, the adjoining owner on one side is the District Council and on the other side is European title which had been sold I think to the New Zealand Insurance Company.

Judge Spencer: The point that I'm making is that notice isn't merely the date. It's also particulars sufficient to inform the nature of the application to those parties affected in whom they have an interest and accordingly unless there was notice in that form sufficient to inform then people who may have attended wouldn't have necessarily done so with the necessary preparation to attend. That's the point isn't it.

Mr Charters: Bearing in mind Sir, that these applications as I have stated in my submission were merely for directions in more than in the sense of trying to prove the accretion at that time. We wanted really to set up guidelines as to what the Court actually would like us to prove to ensure that we could shoot home a claim for accretion and the hearing basically went on on the basis of what information we had provided at the original hearing and I did make it reasonably clear that I had a lot of other evidence and witnesses in terms of other people to prove the gradual process that was necessary. In my view the case is as such did not at the original hearing have the full amount of evidence that should have been produced to the Court to make a correct decision. My only excuse for that Sir is that we have been trying to ask the Court for directions as to what they would require us to prove for a successful determination of the matter. Now that process Sir, had been going on since 1969 when I first arrived in Rotorua and with Judge Scott on numerous occasions and on numerous long hearings and it was more or less said that it should be a political decision and it was almost too hard to apply one self to it.

Judge Spencer: So you were really treating the Lower Court hearing on 10 September last year as a preliminary hearing and the evidence that you adduced as such was a scoping exercise you might say, for the larger undertaking as to the evidence you would require to satisfactorily prosecute your application, is that what you're saying.



Mr Charters: That's exactly what I'm saying Sir.

Judge Spencer: But before you turn to your submissions, I'd like to invite Judge Carter. Is there anything you'd like to ask Mr Charters at this point.

Judge Carter: Mr Charters, it seems to me that if we turn down your request to adduce further evidence today and we have to be bound by what is the law rather than what we think might happen, we then have a decision which is possibly going to be very difficult for you to argue the rest of your case on appeal. It seems a distinct possibility that it may be better from your point of view if you could get back into the Lower Court again.

Mr Charters: It did exercise my mind completely that way as to that opportunity to have the matter heard de novo and I always was aware that that was an option, but I honestly felt Sir that after having this matter being aired for nearly 20 years now, and it had been going on for another 20 years prior to that, that it may be best to bring the matter before this Court because I think it is of that type of significance and the main authorities are directly from the Privy Council and the only real appeal from this Court is to the Privy Council and it's just one of those things that I think it is a consideration which I think this Court can quite fairly take into account that it is of such importance that it should be considered by this Court in any case.

Judge Carter: Once we start considering it and you start talking about applications to Privy Council, it then brings me to the legality of your application. The legality of the appeal and where are you possibly going to get to if we continue. The application is made by Mr Phipps. I tend to think that that would be flawed as he is not a person interested under Section 27 of the Maori Affairs Act and Section 27 provides that it's only a person interested that can bring an application.

Mr Innes: He was acting on behalf of interested parties.

Judge Carter: I'll accept that, but then if we have a look at the regulations they say that the application must be signed by the applicant personally. So you can't have an agent if you're trying to say Mr Phipps was an agent. You can't have him signing as agent for anybody. The appeal is lodged by you on behalf of Phipps Hawley Limited, not Mr Phipps, Phipps Hawley Limited. So we've got another procedural difficulty there and if the Appellate Court is being asked to look at this thing virtually de novo then with possible appeals or review either in the High Court or to Privy Council. I think that these procedural matters would need to be right.

J. Carter

Mr Charters: I suppose I tend to think of the Maori Land Court as having an overall riding jurisdiction to consider matters and not be such a Court as to adhere to form as may be like the High Court. I've always thought it was in a sense a Family Jurisdiction over Maori interests and I think in the past in any of these situations have been rectified as to form even on the day. In my experience that has happened frequently. I don't know whether that's there to be correct or not, I haven't looked at that point sufficiently as well.

Judge Carter

I think we can do it where there's scope within regulation, but it becomes a bit more difficult where the matter is laid down in the section of the Act. Certainly we don't want to be pedantic over these issues, but we're looking at matters which are going to have very far reaching effect and it seems to me that we should be very careful to see that everything, all procedures are right when we come to a case such as this. Again I'm only raising this

Mr Charters: It is of that importance that procedurally I wouldn't like after having gone through the process to find ourselves in a situation where we could have all wasted our time because procedural point under a section. I readily concede that Sir.

Judge Carter: It just seems to me that perhaps the whole thing should be referred back to the Lower Court before hearing de novo, so that your full amount of evidence can be brought there, if there's a possibility of that being done.

Mr Charters: If that is the feeling of this Court I had considered that myself as I said originally and if the Court felt that there was a procedural bar there, we could find ourselves in some sort of danger then I wouldn't like to take that risk.

Judge Carter: We could effectively give you a decision which amounted to a non-suit, which would allow you to start again without all the problems that may exist in this application. That's not wanting to step aside from it.

Mr Charters: No. It was that feeling, the reason why I continued with that and raised the matter with Mr Phipps when we originally lodged the application but he like, I and he more so, in some ways has lodged many of these applications in this way for the last 35 years.

Judge Carter: Oh yes, and there have been many other people who have done exactly the same thing and they've never been picked up. Normally they won't be taken on issue but they can be. This is the problem that we could have here.

Charters

Judge Spencer: Judge Rota have you got any comment or questions that you may wish to make.

Judge Rota: Only in line with what's been said Mr Charters, that given the seriousness and the weight of the matter that you bring before this Court. Of course these procedural questions assume larger proportions and the Court is primarily interested in serving to the Court, serving to you decisions that we might make, actually fear scrutiny, but more certainty for you, because of the kind and the weight of the matter that you bring before the Court, and we would prefer to opt for that kind of certainty rather than like you say take the risk.

Mr Charters: I must admit to having some doubts myself originally about bringing the appeal on in the sense of where the application was made and the aspect of bringing a fresh application myself. My reason for bringing forward to this Court was the aspect of the importance of the matter. I think it's one I've always had in the back of my mind for a long time and it should be brought forward to determination in a proper way and it's been a long time in doing that. I would like to see it brought forward correctly, and if its the Court's thought that it should be brought again, I have got no problems with doing that.

Judge Spencer: Mr Charters, I concur of course with Judges Carter and Rota and would emphasise probably as a primary reason the lack of formal notice to other parties. In particular, in my view, it is essential that you should give notice to your fellow owners of both blocks because they could come to Court and say, ' Here, we didn't want that boundary defined'. Now I'm just saying that they've got notice of the application, they don't need to consent to the application being made because if filed as commented by Judge Carter by a person with an interest, you don't have all persons with an interest filing an application, just one would be sufficient obviously, but whilst they don't need to consent to the application being brought, they must on the other hand have an opportunity to appear because they may or may not wish to have the boundaries defined in the way that you said. So they, together with the Regional Council or the successor to the Catchment Board, the District Council, whoever else, possibly know this, but I think that it's you as the applicant who will have to determine who has an interest and doubtless these two gentlemen here represent bodies who have an interest, but I would suggest to you that there are a numbers of others and in order to hedge against any suggestions of informality and therefore flaw procedurally, it should be done formally in the sense of a proper record and evidence of notice having been served with particulars, I would suggest. So having regard to those comments, what course of action are you now going to suggest to the Court.

Charters

Mr Charters: Sir, with respect to the owners of the block, I with two other Trustees who are the owners of 2/3 of both blocks and my aunty, one instance owns the other 1/3 and she's giving evidence in support, and my first cousin and their two Trusts are aware, so the aspect that unite us to the owners in the block is not one of a problem so far as we are concerned. They have basically been family owned blocks right through and in relatively single ownership in the sense that we have set up Trusts from great grandparents through to today, so that you haven't had the fractionalisation of interests. The second aspect of course is that all of the parties including the Arawa Trust Board and with the Appeal have been served with a great volume of information and affidavits and what have you, so they are well seized and they knew of the hearing today and they obviously they haven't appeared. I think that would be the situation at any further hearing. It certainly has been that way and I'm sure that people do know exactly

Judge Spencer: Well there's no evidence as such formally, prior to the Lower Court hearing of those procedures having been adopted.

Mr Charters: It was really this Court who advised the notices to the large variety of people and the Maori Land Court and we followed those instructions.

Judge Spencer: Of this year. Not of the Lower. That's the problem that we had, and also the other procedural issues which Judge Carter has raised. In the light of your earlier comments, have you got an application you wish to make to this Court.

Mr Charters: I'm quite happy Sir, if the Court feels the appropriate way of handling this matter is by an application de novo in the correct way of the Trustees bringing the applications or myself as an owner bringing the applications as a Trustee, then I am quite happy for this appeal to be withdrawn and a fresh application made. I would say Sir, that in saying that I would request this Court to give some sort of direction if it could as to the matters that would likely to carry out and merely from the point of view of advice in the sense that I think if this Court laid down those procedures then if we brought it forward we have got some direction which would be extremely helpful.

Judge Spencer: Well, can I just put it like this to you. I invite you to withdraw the application, seek leave to do so, whereupon we would grant thee to withdraw, the application, which means that there's no determination of any issue by this Court. As to directions, they should be issued by the Court which is hearing the application and once you withdraw the application as we basically suggested to you, then there's nothing further for us to comment upon and it's entirely up to the Court receiving the application and from whom you will seek directions specifically.



Mr Charters: It may well be Sir, advisable then, maybe not to withdraw but to have the appeal determined on the point that it is incorrect as to form it should be X, Y and Z and certain people notified because I think if it does proceed that way, it's not only assistance to the applicants but it gives it a measure of certainty with respect to the application coming before the Lower Court.

Judge Spencer: Can I just point out two little points about that. One is, that as the applications presently stand, there is a procedural defect which Judge Carter has referred to particularly. If we still deal with that application, say direct a rehearing, by the Lower Court the basis of it is still procedurally broad in a sense. On the other hand if we step aside from it by way of a withdrawal of the application and grant leave, then the matter will be heard de novo and we still have the Appellate procedure to have resort to. Now if this Court puts in its oar and then have to sit on appeal we are prejudicing then in a sense our further appellate function. That's the only point that I would make and I would suggest within the fresh application proposed you seek directions and put up what might otherwise be in other jurisdictions an inderogatory type thing with regard to what do we require please seek directions.....

Mr Charters: And in sense Sir, we could follow the procedure that we have already proceeded with, with respect to this appeal and lodge the application and supporting documents which would be a very simple process and then ask for further directions from the Court and I do feel that Sir, that if it is the opinion of this Court that there could be the risk of procedural difficulty which could cause all of us problems and I would on that basis seek leave to withdraw.

Judge Spencer: Thank you. Is there anything further Judge Carter you'd like to say.

Judge Carter: No.

Judge Spencer: Well, I think that we just need to step down for a moment because in seeking leave to withdraw Mr Charters, you may also have an application to make with regard to costs or whatever. We'll assume that such an application is being made and perhaps we can consider that matter just for a few moments in Chambers just to have a look at the record as to what has been paid. There haven't been a great number of people inconvenienced on that issue and we just need to check it because we haven't actually discussed this issue of course and so on the assumption that you might have made the queries then we'll just stand down for a short time.

Mr Charters: Thank you Sir.



Court adjourned 2.47pm. Court reconvened 3.11pm.

Mr Charters: May I please the Court. After reviewing this matter, it appears that there may be some difficulty with respect to the withdrawing of this application as we have now a new Maori Affairs Act which may seriously affect our application and whilst in the past it would have been as easy to withdraw and lodge a fresh application under the old Act, our position at this time may be impaired by the introduction of a new Act, hence Sir, I would respectfully request the Court to not proceed with my application to withdraw and would respectfully ask the Court to consider referring this matter to the Lower Court for rehearing.

Judge Spencer: Thank you Mr Charters. The Court accepts the submission and considers there is some merit in it. It is clear from the minutes of the hearing on 10 September last year that the evidence adduced was preliminary in nature. There was evidence given concerning accretion and lake levels and things of this sort which would have required expert evidence. The Court has been concerned with this and of course with the application made in the knowledge that the evidence in the Lower Court was deficient in this and in other respects that further evidence be adduced in this appeal. Accordingly, we are of a mind to make an Order granting a rehearing of the application in the Lower Court and that the applicant should seek the leave of that Court to amend the proceedings to cure the defects which we had discussed previously during this hearing and to give notice of the application to the parties whom we have already mentioned during the course of this hearing such as the other owners in the subject blocks, the Regional and District Council, Government agencies etc and at the hearing we recommend that the Lower Court give directions as to the issues to be addressed in this application and the sort of evidence that the Court would require to consider those issues. We appreciate that the issues of this application are complex and far reaching and that accordingly there needs to be proper expert evidence given. We consider it desirable that the Lower Court after hearing parties interested at a preliminary hearing will then be in a position to give directions as to the specific expert evidence which is required for the matter to be heard and dealt with in substance. We wish to leave it of course to the Lower hearing to determine its own procedures but at the same time we consider that the issues are of sufficient substance that a preliminary hearing and directions of the sort indicated would be beneficial. Accordingly, the Order, a rehearing of the application in the Lower Court. Finally on the question of costs. We note that for both appeals there is a total of \$860.00 paid but \$260.00 of that was for the preparation of the record and \$600.00 by way of security of costs. In all the circumstances, we consider it only fair that all the costs be refunded to the appellant. They having paid application of these both in the Lower Court and now for this appeal and that accordingly they will not be prejudiced by the additional

Spencer

8 Waiariki Appeal MB 218
Wednesday, 18 August 1993

costs which were required for the preparation of the record and the hearing today. We consider that the matter should truly be heard de novo in all respects. Thank you Mr Charters.

Mr Charters: Thank you very much Sir, I appreciate the Court's assistance.

Judge Spencer: Kia ora.



Judge