C.J 1993/5

IN THE MAORI APPELLATE COURT
WAIARIKI DISTRICT

IN THE MATTER of an appeal by **DONALD PERCY COLES**, **RONALD FREDERICK COLES** and **GRAHAM JOHN COLES** against a decision of the Maori Land Court made at Rotorua on 13 November 1992, dismissing an application made pursuant to Section 432 of the Maori Affairs Act 1953 in respect of Whaiti Kuranui 1BY2 and Other Blocks

Date and place of hearing: Maori Land Court, Rotorua, Wednesday 12 May 1993

Decision re Costs: Delivered at Whangarei on 16th day of November 1993

Coram: Judge A D Spencer (Presiding)
Judge G D Carter
Judge J L Rota

Counsel for Appellant: Messrs Dennett, Olphert, Sandford and Dowthwaite (Mr Dennett)

Counsel for Respondent: Messrs McCaw, Lewis, Chapman (S R Clark)

In its decision of 30 July 1993 the Court indicated that it was of a mind to award costs of $1,500.00 against the Appellant for reasons including the following:

1. In the light of Section 68(1)/93, both the application and the appeal are ill founded.

2. The appeal was couched in terms so general that it is reasonable to expect that the Respondent would be unable to prepare or properly prepare an answer.

Counsel were given 14 days in which to file written submissions on the question of costs.

Both parties have filed submissions. Counsel for the Respondent has sought an award in accordance with that indicated by the Court.

The solicitor for the applicants, Mr T R Kinder, has filed a submission suggesting several grounds as to why costs should not be awarded. These may be summarized as follows:

1. The application had been made at the invitation of one of the resident Judges of the Maori Land Court at Rotorua and had been the subject of considerable consultation between the Appellants and Court staff. The legality of the roadway had been a matter of dispute for many years between Coles and the former owner of the dominant tenement.

2. The Respondent, Ronald James Smith, was not an owner of the land and had no status to appear as Respondent.

3. The Appellate Court decision was made on a question of jurisdiction and was not a finding against the merits of the appeal.

4. The proceedings were brought in good faith by the Appellants and were brought in consequence of uncertainties over the roadway.

This Court has considered those submissions and finds as follows:

1. This Court does not accept that these proceedings were brought at the direction of the Court. While we accept that there was consultation with Court staff over the existence of the roadway and the bringing of proceedings, the decision as to whether or not to bring proceedings and the nature of those proceedings must rest with the applicants, now the Appellants, who no doubt would rely on the advice of their solicitor. Proceedings were brought to cancel the roadway and in bringing those proceedings the Appellants run the risk of having costs awarded against them in the case of failure.

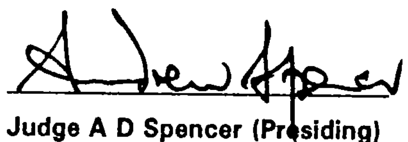
2. The status of the Respondent, R J Smith, was not subject of appeal nor was it questioned in the proceedings on appeal. Any question as to status should have been raised and status determined during the appeal. It is inappropriate to raise it at this late stage.

In any event it appears that R J Smith was a signatory to an agreement for sale and purchase dated 9 June 1992 and regardless of whether he took title or not must have had status as a "person interested" over the time of the Lower Court hearing. As a party at that hearing he was entitled to appear as a party at the appeal - Rule 135 of Maori Land Court Rules 1958.

3. The fact that the Appellate Court found against the Appellants on grounds other than those raised by the Lower Court does not change the situation. The appeal has failed. Normally the Respondent is entitled to costs.

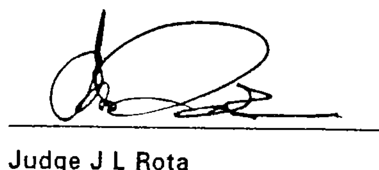
4. This Court accepts that the proceedings were brought in good faith. They sought however to cancel the roadway and thus provide a benefit to the Appellants and a detriment to the Respondent. They were not proceedings to define the roadway and to endeavour to sort out the problems of user, in which instance there may have been a case for each party to bear his own costs. The appeal has failed and we see no reason to change the earlier view that we had formed.

There is an order under Section 57/53 that the Appellants pay to the Respondent the sum of $1,500.00 by way of costs and the Registrar is directed to pay to Counsel for the Respondent the sum of $750.00 held by way of security in part satisfaction of such award.



Judge A D Spencer (Presiding)

Judge G D Carter



Judge J L Rota

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IN THE MAORI APPELLATE COURT
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IN THE MATTER of an appeal by DONALD PERCY COLES, RONALD FREDERICK COLES and GRAHAM JOHN COLES against a decision of the Maori Land Court made at Rotorua on 13 November 1992, dismissing an application made pursuant to Section 432 of the Maori Affairs Act 1953 in respect of Whaiti Kuranui 1BY2 & Other Blocks.

Date and place of hearing: Maori Land Court, Rotorua, Wednesday 12 May 1993.

Decision: Delivered at Whangarei on 30th day of July 1993.

Coram: Judge A D Spencer (Presiding)
Judge G D Carter
Judge J L Rota

Counsel for Appellant: Messrs Dennett, Olphert, Sandford & Dowthwaite
(Mr Dennett)

Counsel for Respondent: Messrs McCaw, Lewis, Chapman
(S R Clark)

The Application:

On 13 November 1992 the Maori Land Court dismissed an application made pursuant to Section 432/53 by members of the Coles family. That application was for an order cancelling a roadway over Whati Kuranui 1BY2C2 and other blocks laid off by an order of the Court made on 17 September 1963. The Coles family now appeal the 1992 order dismissing their application.

The Applicant Claims:

> "The learned Judge has erred in matters of fact and in matters of law in that he has failed to take proper account of the evidence addressed to the Court when hearing the matter and has based his decision on matters of erroneous fact from his personal appraisal of earlier decisions of the Court affecting parts of the land upon which the various applications related and by his failure to properly apply the law in relation to the application made."

The Appellants argued with force both before this Court and the Lower Court, that the roadway should be cancelled because:

(i) The Court in 1963 had no jurisdiction to lay off the roadway over general land to general land, and therefore had no jurisdiction to express the intention to do so. The Court in 1968 had no jurisdiction to make the orders in respect of the 1963 minute, again for want of jurisdiction to make those orders, and questions exist going to the validity of the 1968 orders, as to how accurately the 1968 orders reflect the intentions of the 1963 Court. The Lower Court in 1992 should therefore have cancelled the roadway on the jurisdictional grounds advanced.

(ii) It was submitted that valid orders in respect of what was referred to in evidence as the McDonald section or "arm" of the roadway, have not in fact been made.

(iii) The Appellants purchased certain of the blocks over which the subject roadway passes, with titles clear of any roadway encumbrance, which now defeats any claim to access across those lands in terms of the 1963 determination and 1968 orders.

(iv) Submissions were made by way of background which in this Court's view attacked the continuation of the existence of the roadway on matters of merit.

The appellant seeks orders from the Maori Appellate Court as follows:-

1. That the roadway over the subject lands be cancelled in total or at least that roadway over Whaiti Kuranui 1BY2C3B2 through 1BY2C3B1 to 1BY2C4B1 blocks (the McDonald "arm").

2. Such roadway was never laid off nor never intended to be laid off as the Maori Land Court had no jurisdiction to do so. The Maori Appellate Court has and should therefore exercise jurisdiction to cancel or rectify the order made on 17 September 1963, as it was made without jurisdiction.

3. On the orders as sought being made, the land contained in the roadway should by consequential orders become part of the title to the lands over which the roadway passes to the extent of the roadway on that title.

<u>The respondent claims in answer</u>:

The claims of the respondent are summarised at page 8 of the memorandum of counsel and include:

1. The 1963 order was correctly made and sealed.

2. The Coles, prior to certain land purchases along the roadway, were beneficiaries of the creation of the roadway as the roadway provided access to their lands.

3. S.68/53 operates to preclude challenge of the validity of the 1963 order.

4. Cancellation of the roadway will leave the Smith land (formerly McDonald land) landlocked and to do so would cause extra expense and hardship to the Smiths.

<u>Facts</u>:

On the basis of the foregoing, it is not considered necessary to set out the factual history and circumstances of the subject lands except to say that in 1963 (123 Rotorua MB 269-270), after

hearing the application to lay off certain roadways, the Court expressed an intention to make orders subject to the supply of a survey plan of access. Orders in respect of the 1963 minute of the Court were completed upon survey, and formally drawn and sealed in 1968.

Determinations:

Taking each of the arguments of the appellants in turn:

Jurisdiction:

Without addressing the factual or legal merit or correctness of the jurisdictional argument that the Appellant put before the 1992 Court, it is an argument that attempted to persuade the Lower Court, and now this Court, to bring to an end the 1963 determination of the Court, and indirectly, the related 1968 orders, on the grounds that those orders were made without jurisdiction.

Mr Dennett further submitted that the Appellate Court clearly has the power itself to cancel or rectify any orders made without jurisdiction, and that the Appellate Court may move of its own motion to cancel or rectify such orders. It was submitted that the Court has an obligation to purge the records of orders made without jurisdiction and should avoid "closing a decision that is wrong". Mr Dennett referred to the case of Higgins v Bird 7 Waiariki ACMB 38 in support of his argument. He quoted from that case as follows:

> "The jurisdictional question was a matter raised in issue by the Appellate Court itself in reliance upon a number of earlier decisions that the Appellate Court may move of its own motion to cancel or rectify orders made without jurisdiction (see for example Koti Succession (1968) 12 Whangarei ACMB 260, Ngapuna, Ruka v Mills (1972) 5 Waiariki ACMB 332 and Torere, Kingi v Rika (1983) 6 Waiariki ACMB 322)".

In that case the Appellate Court in 1987 heard on appeal a decision made in 1986. The question before the Lower Court in 1986 concerned the correctness and effect of a decision made by the Lower Court when in 1981, the Court vested certain interests in Trust. The question of jurisdiction of the 1981 Court to decide as it did was considered upon submissions at the appeal hearing. It was contended (as Mr Dennett now submits) that the 1981 Court acted without jurisdiction and consequently, the order should not stand but be interfered with by the Appellate Court. To support that contention, it was submitted in that case that the following comment in Re Taraire Block No. 2 [1916] NZLR 46 (recorded as Re Eruini Maihi) was conclusive in favour of counsels argument on the question of lack of jurisdiction to decide:

> "This Court is therefore of opinion that the Native Land Court has, on the institution of appropriate procedures under this head of jurisdiction, power to purge its records of orders void for fraud or want of jurisdiction..."

On a reading of the Higgins case, this Court notes that the question before the 1987 Appellate Court was whether the 1981 Court came to the correct conclusions on the evidence before it. The 1987 Court heard the arguments for the intervention by the Appellate Court on the ground of want of jurisdiction, but replied to those submissions is follows:

"Having regard to (S. 452/53) ... it is doubtful that S.30(1)(a)/53 should be used today to remedy erroneous orders of the type referred to in Re Eruini Maihi (7 Waiariki ACMB 46)."

The "erroneous orders of the type referred to" were orders which might be void for fraud or want of jurisdiction.

The better view of the Higgins case (and of those cases cited to the Court with the Higgins case) is that it is not in support of the proposition now put to this Court, that the Appellate Court may move of its own motion to bring to an end merely any decision made at any time without jurisdiction. The Higgins case correctly points out that appropriate legislative provisions and procedures are by S.452/53, in place to provide the purging of the record in appropriate cases following compliance with all the principles of natural justice. The Appellants are also referred to the specific preclusions contained in S. 68/53 of which S.452/53 is an exception. S. 68/53 precludes any orders from being "annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than 10 years after the date of the order".

The Higgins case considered a 1981 order in proceedings instituted less than 10 years after the date of that order. That case supports the view however, (as do the cases cited with it suggest) that S. 452/53 is the appropriate section under which such orders, which might be void for fraud or want of jurisdiction, should be considered.

The Appellate Court therefore cannot be seised either by legislative provision or by general principle of law, of an opportunity to bring to an end any order of the Lower Court which itself is not properly before the Appellate Court on appeal.

The Court has also noted the case of in Re Maungatautari 5B1A and anor: Matehaere v Baillie (1976) 15 Waikato-Maniapoto ACMB 188. That case involved a partition order taken on appeal. A provisional determination to partition was made by the Lower Court on 8 December 1975, and final orders in respect of partition were made on 6 July 1976. The order of 6 July 1976 was appealed primarily on grounds relating to valuation but not on grounds relating to the jurisdiction of the Court to make the partition order or on the ground that the Court made the order per incuriam. At the appeal hearing, the Appellant sought leave to withdraw the notice of appeal and the respondent's solicitor asked for the appeal to be dismissed. The Appellate Court however neither gave leave to the Appellants to withdraw nor dismissed the notice of appeal. Rather, the Appellate Court concluded that the provisional determination and the partition order were both made per incuriam, and said:

"This Court is far from unmindful of the fact that it is a "title Court" and in addition that it has an unambiguous responsibility of ensuring that where a patent deficiency in a purported order of the Maori Land Court presents itself of taking some step towards its correction or of putting that order at an end."

That Court recommended that the orders of 8 December 1975 and 6 July 1976 each be set aside immediately, ex parte, as having been made per incuriam.

The Court observes:

In the Matehaere case the order set aside by the Appellate Court was the Order under appeal and in respect of which that Court was seised of jurisdiction. The ratio of that decision is

therefore limited to the setting aside of an order in those circumstances. It is not, as has sometimes been suggested, authority for either the Lower Court or the Appellate Court to set aside any previous order of the Court which is determined to have in it any patent deficiency or was made "per incuriam".

The Appellate Court in Matehaere cited two cases in support of its determination, namely Huddersfield Police Authority v Watson [1947] 2 All ER 193, and, Morell Ltd v Wakeling [1955] 1 All ER 708CA. Those cases both relate to the principle of stare decisis and consider the question of whether a Court is bound to follow a decision of a Superior Court made per incuriam, or whether on that basis a Court can distinguish such a decision. Neither case provides authority for a Court to set aside decisions made "per incuriam".

The topic of "Amending and Setting Aside Judgments and Orders" is discussed in Halsbury 4th Edition Volume 26 Paragraphs 555 and following. After a perusal of that discussion we find, in the case of orders that have been entered and perfected, no rule providing jurisdiction to any Court, of its own motion, to set aside any order that is chanced upon at any time as having been made "per incuriam". It is correct that orders made per incuriam can be set aside but only by a Court properly seised of that issue in respect of an order subject to judicial review or on appeal, or pursuant to jurisdiction given by specific legislative provision.

The Appellate Court in Matehaere recognised this principle when it said that where a "patent deficiency" presented itself in a purported order of the Court, it had the responsibility of doing one of two things. Firstly, "taking some step towards its correction", or secondly, "of putting that order at an end". Those two options said to be available to the Court in dealing with a patent deficiency are not explained. However, despite the unambiguous responsibility to correct the record identified by that Appellate Court, it is implied that the order in which the patent deficiency presents itself can be put at an end but only in certain circumstances - such as in that case where the question was of a patent deficiency in an order immediately on appeal. In other circumstances, steps only can be taken towards correction.

The Appellate Court in In Re Awapuni Moana, Pere v Rongowhakaata 33 Gisborne ACMB 54 also recognised this principle and there merely took steps towards correction. That case concerned an appeal from a determination under S.30(1)(a)/53. In considering the appeal the Appellate Court drew attention to the possibility that a previous order under S.267/53, which created title to the land and in reliance upon which the Section 30(1)(a) order was made, may have been made without jurisdiction. The Court, after discussion with and with consent of Counsel, directed a rehearing, and set certain steps which if taken would correct any deficiencies that might render orders creating title invalid.

While it may be suggested that the Appellate Court in Awapuni did not give full recognition to the provisions of S.64(4)/53, there is nothing in that case inconsistent with the principles expressed above. The Appellate Court did not move to cancel or set aside the S.267/53 order. It noted only that there was some doubt as to the validity of that order and created opportunity for the parties to avail themselves of the provisions of S.44/93 (previously Section 452/53) which were indicated as being appropriate to determine and remedy such a question.

Legislation affecting Orders:

Maori Land legislation supports the general principle that an order of the Court remains a valid order until it is pronounced as at an end by another Court being properly seised of the question. This is so despite any defect in the making of the order, including a want of jurisdiction. This principle is consistent with the principles of natural justice in that all parties affected by the actions of the Court have a right to be heard on fact and law in both the creation and extinguishing of rights.

Provisions of the Maori Affairs Act 1953 in support are:

> Section 64(4) "Every order made by the Court shall be presumed in all Courts and in all proceedings to have been made within the jurisdiction of the Court, unless the contrary is proved or appears on the face of the order".
>
> Section 68(1) "No order made by the Court with respect to Maori land shall, whether on the ground of want of jurisdiction or on any other ground whatsoever, be annulled or quashed, or declared or held to be invalid, by any Court in any proceedings instituted more than 10 years after the date of the order".

Notwithstanding that these provisions are conclusive as to the effect of orders, the legislature has in S.60/53 and S.452/53, provided mechanisms for amendment or cancellation of orders. S.452/53 provides the only exception to the provisions of S.68(1)/53.

In the present case then, the 1963 determination and 1968 order must be presumed to have been made with jurisdiction. They currently remain, and must be recognised as valid orders of the Court.

Findings on Jurisdiction:

This Court finds on the questions of jurisdiction raised in this case:

i) The Lower Court had no jurisdiction to cancel the 1963 determination or the 1968 roadway order on the grounds that that determination and order were made without jurisdiction.

ii) The Appellate Court, likewise, has no such jurisdiction.

Is the 1968 Order Valid?

Having found against the Appellant on the questions of jurisdiction, the validity of the 1968 order need not be considered by this Court. We would however make some observations.

It must be presumped in this case that the 1968 order is validly made. The onus in establishing otherwise rests with the appellant.

The question of jurisdiction to make the roadway order depends on the line of original roadways laid out in the relevant 1935 order. Court records and plans relied upon by the 1935 Court and evidencing the line of roadway were not or could not be produced at the 1992 hearing. The evidence on this point therefore was based on conjecture only.

Accordingly, there was insufficient evidence before either the Lower Court or this Court to permit a finding that the 1968 order was made without jurisdiction.

The 1968 orders were made to vary previous roadways. Instead of making an order for variation, the Court cancelled existing orders and made new orders in substitution. The Appellant claimed that the Court extended the line of roadway to provide access to Whaiti Kuranui 1BY2C4B1, general land owned by the Respondent. It is suggested that the Court therefore provided access to general land over general land. If this were the case, it is open to debate that the Court acted without jurisdiction.

We have indicated that the only means of placing before the Court the question of the validity of the 1968 order, is under S.452/53. We are not suggesting that such application should be made. It is arguable that the Court could have achieved the same 1963/1968 result by leaving the original 1935 orders extant, and making an order linking the 1BY2C4B1 block with the existing roadway. If on any S.452 inquiry the 1968 Court is found to have made a mere procedural mistake but that the same result could have been achieved by orders under other sections of the Act, it would be unlikely that the Chief Judge would use his discretion to set the 1968 order aside.

Indefeasibility:

The Appellants argue the provisions of S. 62 and S. 99 of the Land Transfer Act 1957 to support the proposition that at the date of the purchase by the Appellants of certain of the subject blocks over which the roadway in issue passes, the titles to those lands were absolutely free of all encumbrances or interests relating to the roadway. It is proposed that on that basis, there is nothing now binding the Appellants to provide roadway access over their lands. They argue the principle in Sutton v O'Kane [1973] NZLR 304 and say:

> "Any form of equitable easement, or any claim to one, over 2C3B2 (yellow) cannot survive the transfer of the title to the Cole's family who took title without any fraud or dishonest conduct".

The Court refers to S. 36 of the Maori Affairs Act 1953. The effect of this Section is that any order of the Court made in respect of land being the subject of a Land Transfer title, may be transmitted to the District Land Registrar who thereupon has the mandatory duty to register the order against that Land Transfer title. This provision thus provides the continuing potential for the 1968 order to be registered against all titles to which the order relates. In that circumstance, the indefeasibility rules are defeated by the specific exception in S. 36/53.

Merits:

In setting out matters of background to the appeal, the Appellants advanced factors which could be seen as relating to the merits or otherwise of the continued existence of the roadway. These factors were not argued as specific grounds, and were advanced with no significant detail or vigour in this appeal.

It was said that the roadway:

(i) Was the subject of continuing dispute between users.
(ii) Interferes with Coles management of their farm.
(iii) Creates problems in mixing of stock as driven stock cannot be contained within the bounds of the roadway.
(iv) Causes deviation by other users on to Cole's land when transporting stock.
(v) Creates considerable inconvenience in gates wrongly being left open or closed.
(vi) Creates continuing cost in maintenance.

It was claimed that the McDonalds did not in respect of the road, contribute to survey, formation, maintenance, fencing, gates, cattle stops, and despite continued requests of the McDonalds by Coles for agreement as to definition, there was none and continues to be none. It was said by the Appellants that the purpose of the Lower Court application was "to put it onto the McDonalds to apply for access, if they required access, and to provide proposals for a definition, formation, maintenance, fencing and other resolutions necessary to ensure no further dispute".

With respect, this Court must place significant weight on the need to maintain access to the McDonald (now Smith) land. The respondents state the general principle that no land should be land locked. Those factors submitted by the Appellants as meritorious reasons for cancellation of the roadway do not in this Court's view put aside or outweigh the merits found for creating it, and indeed, now maintaining its existence. The factors now argued are more of a description of a problem with co-habitation and dispute as to user. The matters of co-habitational difficulty can be the subject of other applications for orders to provide equitable solutions. The roadway remains necessary for access to the Smith land and nothing has been said by the Coles to compel any alternative view. In the present circumstances however, the case put for cancellation of the roadway, on merit, is insufficient.

Summary:

Essentially, the Appellants submit that the Lower Court in 1992, in failing to cancel the 1963/1968 order on the ground of want of jurisdiction, was wrong at law. We find that the Lower Court in 1992 had no jurisdiction to decide the question before it on that ground. We also find that this Court similarly has no jurisdiction to bring the 1963/1968 order to an end in the context of this appeal. Those orders, while the Appellants would seriously question their validity, remain in full force and effect as orders of this Court until the Court, properly seised of the question, has jurisdiction to declare those orders at an end. The Appellant's arguments that they may rightfully ignore the roadway orders on the grounds of indefeasibility of title, are not supported by Section 36 of the Maori Affairs Act 1953. Lastly, there are strong public policy reasons to retain the roadway access to the Smith land. There has been insufficient merit advanced to justify an order from this Court which might overcome those public policy reasons to cancel the roadway.

Decision:

The appeal is dismissed.

Costs:

The question of costs is reserved for further submissions. However, the Court is of a mind to award costs against the appellant in the sum of $1500.00 for reasons amongst which are the following:

1. In light of S.68(1)/1953, both the application and the appeal are ill founded.

2. The appeal was couched in terms so general that it is reasonable to expect that the respondent would be unable to prepare or properly prepare in answer.

Counsel for the parties may, within 14 days of the date of promulgation hereof, file written submissions on the question of costs.

The Court orders that the sum paid by the appellant for preparation of the record is to be applied by the Registrar for that purpose.

Judge A D Spencer (Presiding)

Judge G D Carter

Judge J L Rota