

I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O AOTEA
*In the Māori Appellate Court of New Zealand
Aotea District*

APPEAL 2023/9
AP-20230000032406

WĀHANGA Section 58, Te Ture Whenua Māori Act 1993
Under

MŌ TE TAKE Rakatō B
In the matter of

I WAENGA IA SHELLEY PUOHOTAUA
Between Te Kaitono pīra
Appellant

ME KIM RANGINUI, DAVID PUOHOTAUA AND
And MERE WHANARERE AS TRUSTEES OF THE
RAKATŌ B TRUST
Ngā Kaiurupare pīra
Respondents

Nohoanga: 13 February 2024, 2024 Māori Appellate Court MB 13-18
Hearing (Heard at Whanganui)

Kooti: Chief Judge C L Fox (Presiding)
Court Judge S F Reeves
Judge M P Armstrong

Kanohi kitea: C LaHatte for the Appellant
Appearances

Whakataunga: 11 March 2024
Judgment date

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

Copies to:
C LaHatte, chris@lahatte.co.nz, PO Box 10909, The Terrace, Wellington 6143

Hei tīmatanga

Introduction

[1] The Rakatō B block is administered by the trustees of the Rakatō B Ahu Whenua Trust. Shelly Puohotaua is a beneficial owner in the block but she is not a trustee. Ms Puohotaua moved a bach onto the block without trustee approval.

[2] On 26 July 2023, Judge Warren granted an interim injunction preventing the trustees from removing the bach and preventing Ms Puohotaua from entering the land. On 8 August 2023, he determined that the trustees were properly appointed, and granted a permanent injunction requiring Ms Puohotaua to remove the bach.

[3] Ms Puohotaua appeals. This judgment determines whether the appeal should be upheld.

He aha ngā tono a Ms Puohotaua?

What applications did Ms Puohotaua file?

[4] On 14 October 2020, Judge Harvey, as he was then, appointed replacement trustees for this trust.¹ On 14 February 2023, Judge Warren appointed further replacement trustees.² On 14 July 2023, Ms Puohotaua filed an application per s 45 of Te Ture Whenua Maori Act 1993 challenging both of those orders on the grounds that the trustees were not properly elected (s 45 application).³

[5] On 18 July 2023, Ms Puohotaua filed an application per ss 19(1)(a) and (b), and 85 of the Act seeking an injunction preventing the trustees from removing the bach from the land (the injunction application). She reiterated her concerns in the s 45 application that the trustees were not properly elected. This is the application that Judge Warren heard and is the subject of this appeal.

¹ 423 Aotea MB 19-21 (423 AOT 19-21).

² 463 Aotea MB 288-291 (463 AOT 288-291).

³ CJ 2023/42.

I ahatia i te Kōti kei raro iho?

What happened in the lower Court?

[6] The s 45 application is before the Chief Judge. It has not been determined and was not considered by Judge Warren.

What happened at the first hearing?

[7] On 26 July 2023, Judge Warren convened a judicial conference to consider the injunction application. After hearing from the parties, he granted an interim injunction:⁴

- (a) Preventing the trustees from removing the bach; and
- (b) Preventing Ms Puohotaua from entering the land.

[8] This injunction did not take immediate effect to give Ms Puohotaua an opportunity to remove her belongings from the bach.

[9] Later that day, Judge Warren issued a separate minute confirming the interim injunction. He also directed the filing of evidence and set the injunction application down for hearing on 8 August 2023.⁵

What happened at the second hearing?

[10] Judge Warren heard the injunction application on 8 August 2023. Per s 71 of the Act, he amended the injunction application to include an application per s 18(1)(a) to determine whether the trustees were properly appointed. He then made the following findings:⁶

- (a) He could not look behind the earlier Court orders appointing the trustees;
- (b) The trustees were legally appointed;
- (c) Ownership of the land vests in the trustees, they decide how to administer the land;

⁴ 470 Aotea MB 117 (470 AOT 117).

⁵ 469 Aotea MB 212 (469 AOT 212).

⁶ 472 Aotea MB 136-181 (472 AOT 136-181).

- (d) There was no evidence that the trustees approved the bach on the land; and
- (e) The bach had to be removed.

[11] Judge Warren took into account the s 45 application but said he had no jurisdiction to determine it. He amended the earlier interim injunction so that it now required Ms Puohotaua to remove the bach by 20 August 2023.

[12] Later that day, Judge Warren, once again, issued a separate minute confirming his decision.⁷ In that minute, he cancelled the earlier interim injunction and granted a new injunction per s 19(ba)(i) of the Act preventing Ms Puohotaua or her agents from entering the land other than to remove the bach.

He aha ngā take o te pīra?

What are the issues on appeal?

[13] The appellant filed the appeal without the benefit of advice from counsel, focusing on matters irrelevant to the nature of the order appealed. However, her appeal did raise the following questions:

- (a) Was the interim injunction order properly made?
- (b) Was the s 18(1)(a) determination properly made?
- (c) Was the permanent injunction order properly made?
- (d) What relief should be granted if any?

[14] We consider these questions in turn.

Kua tika te ōta whakatāpu tāria i te whakataunga?

Was the interim injunction order properly made?

[15] In the lower Court, Ms Puohotaua prepared the injunction application herself. She did not have assistance from counsel. In that application, Ms Puohotaua:

⁷ 470 Aotea MB 115 (470 AOT 115).

- (a) Referred to the trustee replacement orders;
- (b) Argued that the trustees were not properly elected;
- (c) Referred to her s 45 application; and
- (d) Sought an injunction per “s19(1)(a)(b)” of the Act.

[16] Section 19(1)(a) of the Act relates to permanent injunctions. Section 19(1)(b) of the Act relates to interim injunctions. It is not clear from the application whether Ms Puohotaua was seeking an interim injunction pending the determination of her s 45 application, or whether she was seeking a permanent injunction against the trustees. It is not the Judge’s role to repair or frame an application before the Court. However, in a case such as this, the Judge needed to be clear on whether the applicant was seeking an interim or a permanent injunction. Judge Warren did not clarify this. If he had, this may have avoided some of the procedural errors that followed.

[17] Firstly, Judge Warren convened a judicial conference on 26 July. The Court cannot grant orders at a judicial conference. A formal hearing must be convened to do so.⁸ Despite that, he granted the interim injunction at the conference without convening a formal hearing. He had no power to do so.

[18] Secondly, Judge Warren granted an interim injunction without giving any reasons supporting that decision. Before granting an interim injunction, the Court must be satisfied that:⁹

- (a) There is a serious question to be tried;
- (b) The balance of convenience supports the grant of an interim injunction; and
- (c) The interests of justice support the grant of an interim injunction.

⁸ *Karena v George – Karaka Huarua A and B* (2002) 6 Taitokerau Appellate MB 32 (6 APWH 32); *Keepa v Vercoe - Ruatoki B92* [2015] Maori Appellate Court MB 189 (2015 APPEAL 189).

⁹ *Lomax v Apatu - Awarua o Hinemanu Trust* (2013) 22 Takitimu MB 282 (22 TKT 282).

[19] Judge Warren did not make these assessments. He spoke to the parties about the issues in broad terms and concluded by granting the interim injunction.

[20] If both sides clearly consented to the interim injunction, issuing detailed reasons supporting the injunction may not be necessary. This may be what Judge Warren had in mind. He certainly discussed the idea of an interim injunction, and its terms, with both sides. It also appears that Ms Puohotaua supported the interim injunction. Whether the trustees supported the interim injunctions is less clear.

[21] We accept that if the parties clearly consent, it may not be necessary to give detailed reasons granting an interim injunction. However, the Judge needs to make sure that both sides do consent before taking this approach. The Judge should also make it clear in the minute that the order is being granted by consent. It was not clear in this case.

[22] Judge Warren is not the only judge to have fallen into this trap and so we need to provide clear guidance on this point. In the absence of clear consent, the Court had to apply the three-limb test when deciding whether to grant an interim injunction. The judge in this case failed to do so.

[23] We find that the interim injunction order was not properly made.

Kua tika te whakatatū s 18(1)(a) i te whakataunga?

Was the s 18(1)(a) determination properly made?

[24] There was no application per s 18(1)(a) of the Act filed with the Court. Judge Warren identified that, whether the trustees were properly appointed, was an underlying issue in this case.

[25] At the hearing on 8 August, Judge Warren amended Ms Puohotaua's application per s 71 of the Act, to include an application per s 18(1)(a) of the Act. He considered this approach would allow him to determine whether the trustees were properly appointed. He then found that he could not look behind those earlier Court orders appointing the trustees. We do not agree with this approach.

[26] Per s 71 of the Act, the Court can amend any defects or errors in the proceeding. It can do so on the application of any party or on its own motion. It is not clear that there was an error or defect in this proceeding which required amendment.

[27] It is clear that Ms Puohotaua asserted that the trustees were not properly appointed. This is where Judge Warren needed to determine whether Ms Puohotaua was seeking an interim injunction or a permanent injunction.

[28] It may be that Ms Puohotaua was seeking an interim injunction preventing the trustees from removing the bach pending the determination of the s 45 application. Judge Warren had jurisdiction to consider this per s 19(1)(b) of the Act. When deciding whether to grant such an interim injunction, the Court would have to consider whether the s 45 application raised a serious question to be tried. Amending the application per s 71, to include an application per s 18(1)(a), was not necessary.

[29] Alternatively, Ms Puohotaua may have been seeking a permanent injunction preventing the trustees from removing the bach from the land. As discussed below, to obtain a permanent injunction, the applicant must demonstrate an action in trespass before the Court will consider whether to exercise its discretion to grant an injunction.¹⁰ On this approach, Judge Warren could have considered whether the trustees were properly appointed when determining whether Ms Puohotaua had demonstrated an action in trespass. Once again, amending the application per s 71 of the Act was not necessary.

[30] We agree with Judge Warren's finding that he could not look behind the orders appointing the replacement trustees. However, it was not necessary or appropriate to amend the application per s 71 of the Act, to include an application per s 18(1)(a) of the Act, to consider this. He simply had to determine this as part of his judicial function when deciding whether to grant an interim or a permanent injunction.

[31] We find that the s18(1)(a) determination was not properly made.

¹⁰ *Taueki - Horowhenua II (Lake) Part Reservation Trust* [2016] Māori Appellate Court MB 184 (2016 APPEAL 184); *Peihopa v Peihopa* [2021] Māori Appellate Court MB 180 (2021 APPEAL 180).

Kua tika te ōta whakatāpu pūmau i te whakataunga?

Was the permanent injunction order properly made?

[32] After determining that the trustees were legally appointed, Judge Warren found that:

- (a) Ownership of the land vested in the trustees;
- (b) The trustees were authorised to make decisions concerning the administration of the land;
- (c) There was no evidence that the trustees approved the bach on the land; and
- (d) The bach needed to be removed.

[33] There are several problems with this approach.

[34] Firstly, the injunction application sought an injunction preventing the trustees from removing the bach. There was no counter application by the trustees seeking an injunction requiring Ms Puohotaua to remove the bach. Judge Warren amended Ms Puohotaua's application per s 71 of the Act to include an application per s 18(1)(a) of the Act. He did not amend the application to include an application by the trustees to remove the bach. It is unlikely he could have done this anyway given that it was Ms Puohotaua's application and so there was no error or defect that required amendment (at least from her perspective) to include an injunction to remove the bach.

[35] Judge Warren could have granted an injunction of his own motion per s 37(3) of the Act requiring the bach to be removed. However, he did not expressly exercise his jurisdiction per s 37(3). Nor did he give appropriate notice to the parties that he was going to do so. Without taking these important steps, Judge Warren could not grant an injunction requiring the bach to be removed as there was no application before him to do so.¹¹

[36] Secondly, at the 8 August hearing, Judge Warren amended the earlier interim injunction to require Ms Puohotaua to remove the bach. The removal order is not by its nature an interim injunction. It is a final form of relief and so required a permanent

¹¹ See *Tito – Mangakahia 2B2 No 2A1A* [2011] Māori Appellate Court MB 86 (2011 APPEAL 86).

injunction. In the separate minute that he issued following the hearing, he clarified that he cancelled the interim injunction and then granted a new injunction per s 19(ba)(i) of the Act. This does not reflect the oral decision he made earlier that day.

[37] Thirdly, when granting a permanent injunction, the applicant must demonstrate an action in trespass before the Court will consider whether to exercise its discretion to grant an injunction.¹² Judge Warren did not follow this approach.

[38] Judge Warren found that the land was vested in the trustees and it is for them to make decisions to administer the land. He also found that the trustees did not approve Ms Puohotaua occupying the land. These findings establish a foundation to then determine that Ms Puohotaua placing the bach on the land constituted a trespass. However, Judge Warren did not formally make that finding. Even if he had, he did not take the second step of determining whether to exercise his discretion to grant a permanent injunction. While a finding of trespass would give the trustees a prima-facie right to an injunction, that is not the end of the matter. The Court then has to take into account any equities that go for or against the grant of an injunction. Judge Warren did not do so.

[39] We find that the permanent injunction order was not properly made.

Mehemea e taea ana te awhina atu, me pēhea te awhina?

What relief should be granted, if any?

[40] We have found that the interim injunction, the s 18(1)(a) determination, and the permanent injunction, were not properly made. Those orders should be overturned.

[41] Ordinarily, we would send these issues back to Judge Warren for rehearing to reconsider the application taking into account the proper process and principles that apply. However, at the hearing of this appeal, we were advised that Ms Puohotaua has already removed the bach from the land. As the bach has been removed, the lower Court can no longer consider whether to grant an injunction preventing or requiring its removal. There is no utility sending this back for rehearing. We are going to overturn the erroneous orders but take no further steps.

¹² Above n 10.

[42] We also emphasise that overturning the injunction orders does not mean that Ms Puohotaua has a right to enter, or occupy, the land without trustee consent. The trustees decide who can enter and occupy the land. The trustees are also entitled, prima facie, to injunctive relief to restrain any trespass on the land subject to any competing equities. Ultimately, the outcome in this case was likely the right one if the proper process and principles were applied to get there.

[43] Although the appeal is successful, counsel for Ms Puohotaua, Mr La Hatte, received special aid. The trustees were not represented. Costs should lie where they fall.

Kupu whakatau

Decision

[44] Per s 56(1)(b) of Te Ture Whenua Māori Act 1993 we revoke the following orders:

- (a) The interim injunction granted on 26 July 2023 at 470 Aotea MB 117-133;
- (b) The s 18(1)(a) determination made on 8 August 2023 at 472 Aotea MB 136-181; and
- (c) The permanent injunction granted on 8 August 2023 at 472 Aotea MB 136-181.

[45] Costs will lie where they fall.

I whakapuaki i te wā 10:00am ki Whanganui-a-tara, i te rā 11th o Huitangaru i te tau 2024.

C L Fox (Presiding)
CHIEF JUDGE

S F Reeves
JUDGE

M P Armstrong
JUDGE