

13 AOTEA APPELLATE MINUTE BOOK 298-312.

Date : 15 February 1993
 Place : Wanganui
 Present : A G McHugh, Deputy Chief Judge
 N F Smith, Judge
 A D Spencer, Judge
 K R Nicholson, Clerk

Appeal No 1992/20

Ngarara West A3C2

Deputy Chief Judge McHugh

I am the Presiding Judge over this Appeal and with me today Judges Norman Smith from Rotorua and Judge Spencer from Tai Tokerau from the north. This is an appeal against the decision of the Court given at Levin on 14 October 1992 being an Order to cancel the Reservation in respect of Ngarara West A3C2. The Appellant is Mr Kielich. Is he represented by Counsel?

Mr Vickerman

May it please Your Honours, I appear for Mr Kielich.

Deputy Chief Judge McHugh

Any Counsel representing any of the persons affected in this matter?

Mr Heatley

Counsel's name is Heatley. I appear for the seven respondents who are the beneficial owners of the land in question, three of whom are present today.

Deputy Chief Judge McHugh

Let me just say at the outset, this is an Appellate Court hearing. It is dealing with grounds of Appeal. It is not a rehearing of the application that was heard before the Lower Court. We are dealing with simply the matters that are the grounds of appeal and related to that. This Court does not receive evidence unless prior application has been made and affidavit filed and requests made for consent to lead evidence. There will be no persons appearing here today, giving their version of what should happen, what might happen or what has happened. What we are concerned with is the Order that was made and whether that Order was properly made or not. In these proceedings the Appellate Court proposes to restrict the matter to the hearing for Counsel who represent the beneficial owners of the land and also those who claim interest in it by virtue of the Proclamation Notice when the Reserve was taken. There may be some individual persons present who have signified interests and who wish to be heard. We may give that opportunity later if the Appellate Court considers that any statements that they might make which go to the grounds of appeal are relevant. At this point we will confine ourselves to hearing from the appellant and then from Counsel for the respondent and we will then reconsider the question at that point. Perhaps I should say, Mr Vickerman, that you probably have come into this matter after the Notice of Appeal was filed?

Mr Vickerman

Yes, Sir.

Deputy Chief Judge McHugh

Before we proceed a little further, perhaps I should say that for the sake of getting it on the record, Counsel for the respondent has filed in the Court a copy of his written submissions and these are on the file. Have you got a copy of those Mr Vickerman?

Mr Vickerman

Yes.

Deputy Chief Judge McHugh

That is where the reference is being made to the history and that is the reason that you have just made this statement.

Mr Vickerman

It is not, Sir. My client didn't get a copy of those submissions until sometime over the weekend but I did say to Mr Kielich when he saw me on Friday we really have got to look to see where you stand in this matter because somebody is likely to take the view that you were trying to get an unfair advantage and that is what precisely what my friend has said in his submissions. That arose before hand and Mr Kielich is quite happy to abide by whatever the decision is provided.

Deputy Chief Judge McHugh

Rather interesting really because I suppose if he wants to buy the land as he has clearly shown in the papers on the record filed, it would be in his interest to have the Reserve cancelled so that those negotiations might be open between him and the real owners of the land. Trustees have no power to sell.

Mr Vickerman

They have got no power to sell it but unfortunately the trustees have been regarded, if I might suggest, as non existent. Mrs Hughes has been unable to attend the Court.

Deputy Chief Judge McHugh

I take it there is nobody here representing any of the trustees of this land?

Mr Vickerman

That is why if I may go back to when Mr Kielich brought this land in 1980, the house that was on the land was dilapidated, the grounds were unkept and also with the adjoining Reserve land. He has tidied up his own place. He has in the intervening years tidied up this area which some people, according to his instructions to me, seem to see as a suitable dump. He has removed the fire risk and in doing so discovered that the house on his land was closer to the boundary than it should be. For that reason he then started to enquire who was the owner of the land, whether it was the Local Authority, why it was reserved and in due course he was referred to the late Mrs Webber who was one of the trustees and from the papers he made available to me he was then advised to obtain the consents of all the owners of 1-16. When he had obtained all except one, and my recollection that was Mr Edwin who is in Court here today, he referred the matter back to Mrs Webber who was unable to obtain the approval of her co-trustee.

Mr Vickerman

It is the part of the residual land to which you are just referring although, you will find that Te Moana Road, by the side of the road you will find the original partition A3C2, A3C1, on the other side A3C33.

Mr Heatley

I can assist the Court quite clearly here because I traced the history of all these lands personally myself. The block hatched in yellow was in fact part of the original subdivision - Lots - it appears to be a copy of DP 35063. The block which is hatched in yellow.

Judge Spencer

Can you tell us what date is approved as to survey. The date which we have got, 7 September 1973, is the date of the Local Authority's approval or consent to it. Have you got a date as to its being approved to survey in the bottom right hand corner?

Mr Heatley

21 June 1973. That shows, Sir, the area hatched in yellow comprises part of the subdivision of A3C 9, 11, 13 and 14. They were sold under the Rating Act and were then subdivided into different sections. The area hatched in green is the totality of the Residue. That was entirely itself sold under the Rating Act to European owners and subdivided in accordance with that Plan. An extensive amount of that Residue was required to be vested as Reserve in the territorial authority. That Reserve now comprises part of the very extensive Edgewater Park which lies between the rear of the Residue and the Waikanae River.

Deputy Chief Judge McHugh

I saw it last evening, Mr Heatley. Could we also get on the record the fact that Mr Heatley has filed written submissions in support of his objection to the Appeal.

Mr Heatley

I tried as hard as I could to follow the normal Court of Appeal procedures.

Deputy Chief Judge McHugh

Thank you, Mr Heatley. It is appreciated that we got those prior to the hearing. It brings me back to this question of notice. Mr Vickerman, you have not addressed it. The grounds of Appeal indirectly refer to the question of permission but they do not state that the other owners other than the A3C2 ownership were given notice of the Lower Court hearing at which the cancellation took place. Now you are appealing for the appellant. Have you any submission you wish to make in respect of that?

Mr Vickerman

I did write in and asked whether we might have leave to amend and add a passage which I thought might have helped the situation.

he gave by way of directions to the Registrar to notify - folio 9 of the record is a direction that he gave on 10 August 1992. He expressed the question have the beneficiaries of this Reservation been given an opportunity to express their views on the proposed cancellation of the Reservation. Applicant to file minutes of any meetings held. 2) Any successions to Hannah Udy - attach succession minutes. Note next Wellington sittings in October 1992. That was dated 10 August 1992. On 10 September 1992 Judge Marumaru issued another direction following a note from the Clerk of the Court to him that in reference to his earlier directions of 10 August, please now find enclosed hereunder M Hughes' response of 3 September 1992. That was a letter dated 3 September addressed to Mr Bennett, the Maori Land Court referring to the earlier request of 14 August and simply saying the only beneficiaries of the above block are the seven people who have signed the enclosed form. There is a form submitted with the signatures. They are of course the persons who are the beneficial owners of the land subject to the Reservation. Judge Marumaru's further direction then went on to say this firstly, set down for Levin Wednesday 14 October. It was carried into effect. Secondly the current trustees who are not owners are to be notified of fixture and informed of the purpose of the hearing. Clearly that instruction at folio 13 of the record is precise but the earlier direction of 10 August at folio 9 uses the term beneficiaries, have the beneficiaries of the Reservation been given an opportunity. The important question is, should notice have been given to all of those persons being the owners of Lots 1-16 and also all of the owners of the residual block which was subdivided into a number of other sections. By way of help to Counsel I gave a direction to the Registrar to look at the records of the Court and ascertain whether there had been any written notice sent to the owners of Lots 1-16 on the residual lot. There has been a response from the Registrar who says this:

"I would confirm that notice of the Appellate Court hearing has been given to the original 16 house sites whose addresses were made available to us by the Kapiti Coast District Council. Ngarara West A3C Residue was in 1967 vested in the Maori Trustee pursuant to Section 109 of the Rating Act 1925 and subsequently sold in 1971. The area has since been subdivided and similarly, notice has been given to those owners whose addresses were notified by the District Council.

Plans of the original sections partitioned by the Court in 1953 and their present day features and appellation are being prepared and will be available for the hearing.

I would confirm that the present owners of the original 16 house sites and residue areas were not notified by the Court of the application to cancel the Reservation. His Honour Judge Marumaru's query as to whether the beneficiaries of the Reservation had been given an opportunity to express their views on the proposed cancellation was conveyed to the applicant, folios 9 and 10 of the record. The applicants response was to file consents from the beneficiaries of the two original owners of the Reserve."

resealed and I was told at that stage that we could not introduce that one because it was new evidence. There is a letter of 10 March 1988 addressed to Mrs Hughes. If I may read it: Unfortunately I cannot accept your application as the fee you have sent is incorrect. Please forward your cheque for \$22.00 when returning the application. I have checked the list of owners for Ngarara West A3C2 and find that Te Puni Tamati is shown as a trustee and therefore cannot be succeeded to. If it is intended to replace the trustees in Ngarara West A3C2 a separate application needs to be lodged.

Deputy Chief Judge McHugh

I don't think that is helpful either.

Mr Vickereman

But she is one of the present applicants. Something was omitted. People have come to regard this as a piece of land that could be sold without having regard to the original Trust set up by the late Hana Udy and this morning I found out what I wanted to, namely that on the subdivision or the partition she and her cousin after this was set aside as a Reserve, we thought it might have been something compelled by the Local legislation and she expressed that wish and until such time the Trustee Order based on that until such time as it is discharged we are in a situation where the recommendation cannot be carried into effect. That I think is the basis of the problem.

Judge Smith

Mr Vickereman, this title with which we are dealing at the moment, Ngarara West A3C2 was created by a Partition Order of the Maori Land Court on 9 November 1954 and was vested in the names of two owners, Te Puni Tamati and Hana Udy. It was not until 23 August 1956 that the land was set apart as a Maori Reservation. It had nothing to do with the subdivision of the balance of the land. This was a particular Partition Order which was created for the benefit of two owners and those two owners some two years later decide to set it apart as a Maori Reservation under the provisions of Section 439. Under the provisions of that Section of the Act, there are owners who own the land, there are beneficiaries for whose benefit the Reserve is created and in this instance it appears to be the owners for the time being of Lots 1-16 plus the Residue area, although the minute does refer to Maori owners of Lots 1-16. That does not appear to have been carried through in the Gazette Notice. There are trustees whose responsibility it is to administer that Reserve under the Maori Reservations regulations. They have no power of sale. The land was vested in trustees - Te Puni Tamati, Laurel Jean Webber, Whitu John Edwin and Josephine Mary Edwin of which only one remains alive at the moment. So from the point of view of the setting apart of the Reserve it had nothing to do with the subdivision or partitioning of the balance of Ngarara West A3C block except that out of that A3C block arose Lots 1-16 which were created prior to this setting aside because they are referred to as the beneficiaries for the Reserve. Now any dealings with that Reserve must be in conjunction with the owners, the underlying owners two of whom are deceased, one successor to one and seven successors to the others

Mr Vickerman

There is a recommendation on the file that the Reserve be set aside.

Judge Smith

That's precisely what the recommendation is - that the Reserve be set aside and that the land be revested in the beneficial owners or the underlying owners who were the successors to the original owners in the partition. That is the Order which has been made, that is the Order which your client has filed his appeal on.

Mr Vickerman

With respect, we say that recommendation was made without reference to the trustees or the Trust which they dismissed as of no purpose.

Judge Spencer

You are arguing I take it that the owners of Lots 1-16 were people materially affected by the application heard in the Lower Court. Is that correct?

Mr Vickerman

Yes.

Judge Spencer

Thank you. And as such they should have had notice of the application in the Lower Court. Is that correct?

Mr Vickerman

Yes.

Judge Spencer

Thank you Mr Vickerman.

Judge McHugh

Can we hear from Mr Heatley now.

Mr Heatley

The Judge in his note on page 9 of the record asked had the beneficiaries of the Reservation been given an opportunity to express their views. The question therefore to whom was Judge Marumaru referring as beneficiaries. The application itself was filed by one of the beneficial owners, Mrs Hughes. On the one hand the Judge could have been asking do the other six beneficial owners consent. He may have been of the view that they were the only beneficiaries of the Reservation. That appears to have been how the applicant, Mrs Hughes interpreted it because she filed the consents. Now it seems to me that the question is, if there is a question to be decided today, who are the beneficiaries of this Reservation Order. Is it the beneficial owners at present or in terms of the original Order can it be argued that it refers to owners other than the owners of the Reservation in question. If in the circumstance that all other sections in the original subdivision and the Residue have passed to present day owners all of whom hold European land transfer titles and are not descendants of the original owners, that is a question which may be decided by

considerations that might happen if that takes place. What we are concerned with here as an Appellate Court today is that the Lower Court on the face of it does not appear to have given notice to all of the people who now claim that they have an interest in it and are here today some of them to protest that right. It is pretty clear to this Appellate Court what the situation is I am grateful to Mr Heatley for his frank statement because obviously the course of action that may follow, the Judges will consider this after we hear any further submissions from Counsel on it, obviously the thing to do is to rehear it, to give the people the right to come along and say what the conditions were. We have not seen all the files and the history of what took place when the partition occurred. It is amazing sometimes what research sometimes turns up. If you look at the simple matter, indeed the simplicity of the giving of this land back in 1956 when Te Puni Tamati gave the land he simply said when the land was cut into sections it was agreed that this land be a recreation ground for children. Had a meeting at Levin at the Courthouse, Judge Whitehead was there, Mrs Udy there, we gave it for the people. Mrs Udy's sent a son in law to me to come to town for this sitting. The Judge immediately makes his recommendation that the land be set aside as a Maori recreation ground for use by the Maori owners of Ngarara West A3C Subdivisions 1-16. It would seem to me to mount a fairly strong argument at this point what was in the Judge's mind but not given effect to in the subsequent Order. All of these matters will need to be canvassed because there may be something on a record somewhere which shows the position as clearly set out and what was intended by arrangement made with the Local Body or made as a result of some action that we have not seen. Having said that we are prepared to rule on this matter alone rather than get into the history of everything that has taken place, rather than be here for the whole of the afternoon. Are there any further submissions. Thank you Mr Heatley. Is there anything further you wish to make on this point?

Mr Heatley

That is clearly what the position is. I cannot take the argument any further.

Deputy Chief Judge McHugh

Thank you. I am grateful to you for your statement.

Mr Vickerman

I have no further submissions, Sir. That is where I thought it lay and was hopeful that something of this nature which I presume will be referred back and be heard on the evidence produced.

Deputy Chief Judge McHugh

Thank you. Let me say to the owners who have come, you will get your chance to speak and your right to be heard on the history and everything else if the tribunal, this Appellate Court decides to recall the meeting. We have not made that decision yet. If we decide that this appeal should proceed and we should listen to the other grounds then we may give you an opportunity to be heard if we still think that it is relevant.

Lower Court or from any Appellate Court hearing that might take place thereon.

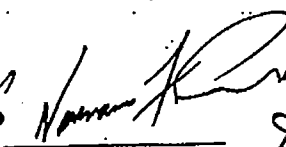
Mr Heatley
As the Court pleases.

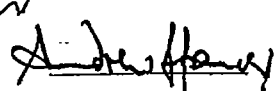
Deputy Chief Judge McHugh

I would like to thank Counsel for their help and in particular Mr Heatley for your frank assessment of the situation which has been most helpful to the Court, although on the face of it might appear to be against your clients interest. But as I indicated this is not the end of the matter. This is simply the decision of the Appellate Court to have the matter reheard, to give everybody the chance to present their views and to be given an opportunity they did not have previously. There are factors that I indicated earlier that will need to be taken into account and considered as they will be by the Lower Court when it rehears this matter. I would like to thank you all who have shown a lot of interest in this matter, owners and descendants and people who live in the locality for coming to the Court and taking part in these proceedings. Kia ora tatou.

Court adjourned.


A G McHugh
Presiding Judge


N F Smith
Member


A D Spencer
Member