IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20150003414

UNDER	Section 19(1)(b), Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Lot 16 DP 61631 and Lot 18 DP 61631 (Being Part Te Tii (Waitangi) B3
BETWEEN	RICHARD-BOYD TAKIMOANA MEREAWAROA DAVIES AND MICHAEL-JAMES DAVIES Applicants
AND	THE TRUSTEES OF THE TE TII WAITANGI B3 AHU WHENUA TRUST Respondents

Hearing: 10 June 2015
(Heard at Whangarei)

Judgment: 10 June 2015

ORAL JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] Richard-Boyd Takimoana and Mereawaroa Davies are occupying residential properties at Te Tii Waitangi pursuant to leases granted by the Te Tii Waitangi B3 Ahu Whenua Trust ("the Trust").

[2] Mr Takimoana occupies Lot 16 DP 61631,[1] and Ms Davies occupies Lot 18 DP 61631[2] ("the properties").

[3] Both properties were subject to fixed term leases which have now expired. On 13 December 2013 the trustees served a notice to quit on Mr Takimoana and Ms Davies requiring them to vacate and deliver possession of the properties.

[4] On 7 March 2014 Mr Takimoana and Ms Davies filed applications in this Court seeking a determination as per s 18(1)(a) of Te Ture Whenua Maori Act 1993 ("the Act") that the trustees were acting in breach of their duties and should be estopped from purporting to evict them from the properties.

[5] By reserved decision dated 31 October 2014 I dismissed those applications.[3]

[6] Mr Takimoana and Ms Davies have now filed an appeal against that decision. That appeal is due to be heard on 11 August 2015.[4]

[7] The Trustees of the Trust have filed proceedings in the Tenancy Tribunal to evict Mr Takimoana and Ms Davies from the properties. The Tenancy Tribunal hearing is set down for 12 June 2015.

[8] Mr Takimoana and Ms Davies seek an interim injunction preventing the trustees from taking steps to evict them and their families from those properties until their appeal is determined.

---

1 CT NA18A/616.
2 CT NA18A/618.
3 *Takimoana – Te Tii (Waitangi) B3 Ahu Whenua Trust* (2014) 90 Taitokerau MB 67 (90 TTK 67).
4 2015 Māori Appellate Court MB 200 (2015 APPEAL 200).

[9] Pursuant to my directions, the Trust was served with the application and was notified of the hearing. Despite that no one appeared for the Trust at the hearing today.

[10] As is standard practice with oral decisions I reserve the right to amend this decision but only as to form not as to substance and not to change the outcome of the decision I am about to make.

The Law

[11] The Court has jurisdiction as per s 19 of the Act to grant both interim and permanent injunctions. Section 19 states:

> **19 Jurisdiction in respect of injunctions**
>
> (1) The court, on application made by any person interested or by the Registrar of the court, or of its own motion, may at any time issue an order by way of injunction—
>
> > (a) against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land, Maori reservation, or wahi tapu; or
> >
> > (b) prohibiting any person, where proceedings are pending before the court or the Chief Judge, from dealing with or doing any injury to any property that is the subject matter of the proceedings or that may be affected by any order that may be made in the proceedings; or
> >
> > (c) prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori freehold land; or
> >
> > (d) prohibiting the distribution, by any trustee or agent, of rent, purchase money, royalties, or other proceeds of the alienation of land, or of any compensation payable in respect of other revenue derived from the land, affected by any order to which an application under section 45 or an appeal under Part 2 relates.
>
> (2) Notwithstanding anything in the Crown Proceedings Act 1950, any injunction made by the court under this section may be expressed to be binding on the Māori Trustee.
>
> (3) Any injunction made by the court under this section may be expressed to be of interim effect only.
>
> (4) Every injunction made by the court under this section that is not expressed to be of interim effect only shall be of final effect.

[12] This Court still has jurisdiction to grant an interim injunction even though the substantive action is an appeal before the Māori Appellate Court. In the case of *Orion Property Trust Care v Du Cane Court*, Pennycuick J held: [5]

> …in the case of an appeal from a court of first instance… the court of first instance has jurisdiction to make an order preserving the subject-matter of the action in the appeal, even though the action has wholly failed.

[13] Generally, an applicant for an interim injunction must satisfy the Court that there is a serious question to be tried before the Court will proceed to weigh the needs of the applicant against those of the respondent to determine where the balance of convenience lies. However, this is not a rigid formula and in the end the fundamental question is "where do the interests of justice lie?"[6]

Discussion

Is there a serious question to be tried?

[14] In determining whether there is a serious question to be tried it is necessary to consider the allegations before the Court, the applicable law and whether there is a tenable resolution of the issues of law and fact on which the applicant could succeed.[7]

[15] At the hearing held before me in 2014, the applicants were represented by Mr Peters. The applicants no longer have legal representation, however, they were assisted today by Mr Hetaraka and others who appeared in support of the application.

[16] Pursuant to a direction from the Māori Appellate Court dated 30 March 2015, the applicants have filed further particulars on appeal.[8] Those particulars set out the basis of the appeal.

---

5 *Orion Property Trust Care v Du Cane Court Ltd* [1962] 3 All ER 466 at 471.

6 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129. Also see *Lomax v Apatu – Awarua o Hinemanu Trust* (2013) 22 Takitimu MB 282 (22 TKT 282).

7 *Henry Roach (Petroleum) Pty Ltd v Credit House (Vic) Pty Ltd* [1976] VR 309, *Sutton v The House of Running Ltd* [1979] 2 NZLR 750 at 753.

8 2015 Māori Appellate Court MB 98 (2015 APPEAL 98).

[17] The applicants rely on the decision in *Attorney General v Ngati Apa* where the Court of Appeal found that all land remains Māori customary land until the native title is lawfully extinguished.[9]

[18] In the present case, it is argued that the native title to these properties has not been lawfully extinguished and so the land remains as Māori customary land. The applicants further argue that they have rights to these properties by reason of whakapapa and ahi ka and that in accordance with tikanga their rights equate to ownership. They contend that the Trust cannot act in a manner that is inconsistent with those rights including seeking to evict them from the properties.

[19] There is no question that the decision in *Ngati Apa* is good law. The principle that customary title remains until lawfully extinguished was recently confirmed by Elias CJ in the Supreme Court decision of *Paki v Attorney General.*[10] The question before me is whether there is a tenable resolution of that law with the facts in this case.

[20] Section 129(2)(a) and (b) of the Act states:

> (2) For the purposes of this Act, -
>
> (a) Land that is held by Māori in accordance with tikanga Māori shall have the status of Māori customary land:
>
> (b) Land the beneficial ownership of which has been determined by the Māori Land Court by freehold order shall have the status of Māori freehold land.

[21] Section 18(1)(h) of the Act provides that the Court has jurisdiction:

> To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not Māori customary land or Māori freehold land or General land owned by Māori or General land or Crown land.

[22] In the present case, on 7 March 1997, this Court made a determination as per s 18(1)(h) of the Act that these properties are Māori freehold land.[11] Those status orders have been noted against the titles to the properties.

---

9 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643
10 *Paki v Attorney General* [2015] 1 NZLR 67
11 83 Whangarei MB 150 (83 WH 150).

[23] Those orders appear to provide a complete bar to the claim that the properties remain as Māori customary land. Ultimately, that issue will fall to be decided by the Māori Appellate Court on appeal. For the purposes of the present application it is difficult to find that there is a serious question to be tried based on that argument.

[24] However, the further particulars also allege that:

(a) The trustees failed to comply with the trust order; and

(b) Equitable estoppel arises.

[25] The bases of those arguments are not clearly set out in the further particulars. This may be due to the fact that the further particulars were prepared without the benefit of legal representation. I do note that these arguments were also presented by Mr Peters on behalf of the applicants in the 2014 hearing. The arguments advanced by Mr Peters are set out in detail in my reserved decision of 31 October 2014 and it is not necessary to repeat them here.[12]

[26] While I ultimately dismissed those applications it could not be said that the arguments advanced by Mr Peters were without merit. Mr Peters presented clear and cogent submissions, on behalf of the applicants, referring to relevant facts and the law.

[27] Given that the issues of breach of trust and estoppel are referred to in the further particulars it appears that those same arguments are still to be pursued on appeal.

[28] I consider that there is a tenable resolution of the issues of law and fact on which the applicants could succeed on appeal in relation to those original arguments.

Where does the balance of convenience lie?

[29] The balance of convenience requires balancing the injustice that will be caused to the applicant if an interim injunction is refused, and the applicant's case ultimately succeeds, against the injustice to the respondent that will result if the injunction is granted,

---

12 *Takimoana – Te Tii (Waitangi) B3 Ahu Whenua Trust* (2014) 90 Taitokerau MB 67 (90 TTK 67).

but then discharged in the substantive judgment.[13] This has also been described as "the balance of the risk of doing an injustice".[14]

[30] An important consideration is the adequacy of damages as compensation to either the applicant or the respondent.[15] If damages are held to be a sufficient remedy to the applicant, the balance of convenience leans against the grant of an injunction. On the other hand, if damages are an adequate remedy to address any loss caused to the respondent by the grant of an injunction, the balance of convenience leans in favour of an injunction.

[31] If an injunction is not granted in this case, the applicants are at risk of being evicted from their homes where they and their families have lived for 40 years. Clearly, an award of damages is not an appropriate remedy in such a case.

[32] As foreshadowed no one appeared for the Trust today. As such it is difficult to determine whether there would be any injustice to the Trust if the injunction was granted but then later discharged.

[33] Mr Takimoana has advised that the Trust has been charging rent at a rate of $300 per week. Mr Takimoana has refused to pay the rent on the basis that he has not signed a tenancy agreement, has not agreed to rent of $300 per week and he is seeking to confirm his right of occupation through the outstanding appeal.

[34] It could be argued that if an injunction is granted, but then later discharged, the claimed rental arrears would increase. That may be considered to prejudice the Trust's position. However, there was no one for the Trust to argue that point. Furthermore, even if that were the case, any such loss could be met by an award of damages.

[35] As such I consider that the balance of convenience is in favour of the applicants.

---

13 *Wellington International Airport Ltd v Air New Zealand Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008.

14 *Cayne v Global Natural Resources plc* [1984] 1 All ER 225.

15 *Wellington International Airport Ltd v Air New Zealand Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008.

Where does the overall justice lie?

[36] Having considered all of these matters I must stand back and consider where the overall justice lies in this case.

[37] In *Wilson v Church (No 2),* Cotton LJ held as follows: [16]

> I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory…

[38] An injunction was then granted to prevent disposal of the property in that case until the appeal was determined.

[39] This approach was also adopted by Pennycuick J in *Orion Property Trust Care v Du Cane Court,*[17] and by Megarry J in *Erinford Properties Ltd v Chesire County Council*.[18]

[40] In the present case the applicant's claim that they have a continuing right of occupation of the properties and so the trustees cannot evict them. I have made a decision dismissing that claim. There is now a pending application before the Tenancy Tribunal to evict the applicants which is due to be heard prior to the appeal. There is a clear risk in this case that an eviction may result prior to the determination of the appeal.

[41] As such an injunction is required in this case to preserve the status quo and to preserve the subject matter of the appeal. Failing to do so may well render the appeal nugatory.

[42] I consider this to be a compelling factor in this case.

---

16 *Wilson v Church (No 2)* (1879) 12 Ch D 454 at 458.
17 *Orion Property Trust Care v Du Cane Court* [1962] 3 All ER 466.
18 *Erinford Properties Ltd v Chesire County Council* [1974] 2 All ER 448.

Decision

[43] Pursuant to section 19(1)(b) of Te Ture Whenua Maori Act 1993 I grant an order by way of interim injunction preventing the trustees of Te Tii Waitangi B3 Ahu Whenua Trust from taking any steps to:

(a) Remove or evict Mereawaroa Davies, her family and possessions from Lot 18 DP 61631, CT NA18A/618;

(b) Remove or evict Richard Boyd Takimoana, his family and possessions from Lot 16 DP 61631, CT NA18A/616.

[44] That injunction is to continue until further order of this Court or of the Māori Appellate Court.

[45] I also direct the Registrar to notify the Trustees and the Tenancy Tribunal immediately of that order.

Dated at Whangarei on Wednesday this 10th day of June 2015.

M P Armstrong
JUDGE