58-60

341

TAITOKERAU APPELLATE COURT MINUTE BOOK VOLUME: FOLIOS:

IN THE MAORI APPELLATE COURT
OF NEW ZEALAND
TAITOKERAU DISTRICT

APPEAL 1993/11

IN THE MATTER of an Appeal by WAERETE NORMAN also known as VIOLET BEATRICE against a final order of the Maori Land Court made at Whangarei on the 17th of March 1993 dismissing an application for an injunction made under Section 30(1)(d) and 30(1)(f) of the Maori Affairs Act 1953 in respect of MURIWHENUA INCORPORATION (a Maori Incorporation under the Maori Affairs Act 1967).

DATE AND PLACE OF HEARING : Tuesday 24 August 1993
Maori Land Court, Whangarei

CORAM : Deputy Chief Judge A.G McHugh (Presiding)
Judge H.K Hingston
Judge G.D Carter

PARTIES : Waerete Norman (also known as Violet Beatrice)
Represented by counsel Mr Hemi Rua Rapata - Appellant.

: The Committee of Management of Muriwhenua Incorporation - Respondents.

The Committee of Management were not represented by counsel and apart from the appellant and Mr Matiu Rata who attended in support of the appellant no other committee members were present in Court. An apology was lodged on the day of hearing by Mr Winiata Brown.

342

DECISION OF MAORI APPELLATE COURT

Waerete Norman (also known as Violet Beatrice) and whom for the sake of convenience we shall call the appellant is a member of the Committee of Management of Muriwhenua Incorporation. There are five other members of the Committee namely:

Winiata Brown
Matiu Rata
Dame Mira Szaszy
Tessa Edmonds
Owen Stensness

At the Annual General Meeting of the incorporation held on 27 March 1993 a seventh member Mate Sucich was elected but his appointment has not yet been confirmed by the Maori Land Court and may not now require confirmation following the enactment of Te Ture Whenua Maori Act 1993 and amended procedures for committee appointment contained in regulations yet to be gazetted.

Muriwhenua Incorporation, formerly known as Te Hapua 42, its name having been changed by Court order on 9 December 1985, originally comprised on its creation in 1965 an area of 12361a 3r 36p. It has now grown by the addition of further land to an area of approximately 14485 acres (5862 ha), the government capital value of which in 1989 was $1,654,500. The objects for which the body corporate was established included the use of the land for growing, felling and marketing of timber. On 6 December 1975 the incorporation entered into a forestry lease with Northern Pulp Limited. The area leased comprised 4000 ha but excluded an area of approximately 1200 ha if that land became a reserve. The Muriwhenua Incorporation has been through some troubled administration difficulties. The Court records disclose an investigation into its affairs in 1971 resulting in the appointment of a new management committee. More recently another investigation application was lodged.

343

That application is before the lower Court and lies adjourned until 10 October 1993 for review pending production of financial accounts for the 1992 year to a general meeting scheduled for 25 September 1993. It is not only the incorporation which has had its problems as the lessee, Northern Pulp Limited, was placed in receivership on 9 July 1990 and pursuant to powers vested in them by Section 348(8) of the Companies Act 1955 the receivers gave notice of their intention to assign the lease pursuant to their powers as receivers. We shall return to that question later in this decision but it was the proposal to assign the lease to a Japanese company Juken Nissho Limited that was opposed by the appellant and led to the filing of an application for injunction in the Maori Land Court on 16 March 1993.

In her application the appellant sought an order under Section 30(1)(d) and 30(1)(f) of the Maori Affairs Act 1953 to prevent any actual or threatened injury to Maori freehold land. In the grounds of application the appellant claimed she and one other member of the Committee of Management - we now know that person to be Matiu Rata - were being deliberately excluded from all discussions and decision-making concerning assignment of the lease to Juken Nissho Limited. It was further claimed the Committee had ignored shareholders advice to explore all options; that the assignment was an alienation which needed affirmation by an annual general meeting and; that no inconvenience would be caused by delaying the decision to assign until all committee members were aware of the proposals and shareholders had confirmed it. An affidavit of the appellant was filed. This alleged there were considerable and substantial breaches of the lease; failure to notify committee members of meeting dates or rescheduling those meetings to allow full attendance; failure to consider other options; exclusion of the appellant and Matiu Rata from the decision-making process. The appellant deposed that substantial loss and financial injury would result to the incorporation and to its land if the Court did not intervene and issue an interim injunction until the matter could be considered at the Annual General Meeting on 27 March 1993.

In an accompanying letter dated 16 March 1993 to the Registrar, counsel for the appellant sought urgency.

Urgency was granted and the application dealt with ex parte by the Court on 17 March 1993. There was no appearance of the parties.

344

The Court found in a short decision that the assignment of the lease was not an alienation and there was therefore no alienation to found an action for trespass. The Court further found there was no substantive application before the Court which would support the issue of an interlocutory injunction under Section 30(1)(f) and that if mismanagement was alleged a different application would be needed with specific allegations in support. Judge Spencer indicated that the allegations concerning holding of meetings would not on their own suggest mismanagement. On the papers filed he accordingly found there were no grounds for an injunction to issue and dismissed the application.

It was from this decision the present appeal lies.

The Appellate Court does not propose to set out in detail the appellant's submissions which are largely set out in a statement of grounds which accompanied the appeal.

It is common ground that there was no substantive application before the Court and the lower Court therefore found that Section 30(1)(f) was not applicable. The Appellate Court agrees that the lower Court was correct in rejecting the application under section 30(1)(f). The application was not an interlocutory application of the kind provided for in that subsection. Before the Appellate Court, Counsel for the Appellant acknowledged that the reference to section 30(1)(f) in the application was an error.

Under Section 30(1)(d) the Court is empowered to grant an injunction against "any or threatened trespass or other injury to Maori freehold land". The lower Court in considering the grounds of the application dealt with the question of trespass which was not really an issue but did not consider whether there was "other injury to Maori freehold land".

The question of what constitutes "other injury to Maori freehold land' is relevant in the present proceedings. It requires the Court before making an order to determine first whether the actions of the Incorporation in connection with its consideration of consent to the assignment constituted actual or threatened injury to Maori freehold land. If it comes to an affirmative conclusion the Court would then look at the other tests such as balance of convenience before making or rejecting an order of injunction.

As it happens the Appellate Court does not need to address this question as the record revealed to this Court a circumstance which even if it was of mind to find in favour of the Appellant meant that it could not provide the relief sought. The record contained a copy of an assignment of the lease executed by the assignor and the assignee on 14 January 1993 and consented to under seal of the Incorporation. The document was noted by the Maori Land Court on 19 May 1993 under Section 233 of the Maori Affairs Act 1953. Whether such consent was given before or after the lower Court hearing is immaterial. The fact remains that there is no effective remedy that this Court can provide the Appellant. Counsel conceded that had the Appellant been aware that consent had been given the proceedings would not have been brought and added, frankly, that "the horse had bolted".

Serious allegations have been made by the appellant in the affidavit filed in the lower Court and in the Grounds of Appeal filed in the Appellate Court which challenge the actions of the Committee. The allegations go not only to questions concerning the internal administration but also the deliberate failure of the committee to consider other options available to the incorporation. They also allege the existence of "considerable and/or substantial breaches of the lease". The incorporation has not had the opportunity to reply to these allegations and this Appellate Court does not propose to comment on any of them. There is already before the lower Court an application for investigation brought by the Registrar under Section 61 of the Maori Affairs Amendment Act 1967. That application remains presently adjourned and in this Appellate Court's view may be an appropriate proceeding for certain of the allegations to be tested provided full details are provided and adequate notice given to those whose actions are challenged to respond. The appellant on the other hand may avail herself of other jurisdiction in the Maori Land Court and/or the other Courts. We certainly are not recommending or determining such proceedings should be instituted but simply bringing to notice in the absence of representation before this Court and the lower Court the nature of the statements made in the pleadings. We do this also because the papers before us in this appeal bring to our notice several matters of concern for which there may well be adequate and satisfactory explanation.

346

First: The deed of assignment (fol 37-41) contains in clause 5 an acknowledgement that "there are as at the date of this assignment no arrears of rental under the lease or any other unremedied breach of any of the lessees covenants or conditions of the Lease" (emphasis added).

This statement would appear to be different from the appellant's view expressed in the affidavit dated 16 March 1993 (fol 62 para 3) and grounds of appeal (fol 72 para 4).

Second: Section 42 of the Maori Affairs Amendment Act 1967 prescribes a mandatory procedure for the affixing of the Common Seal. This does not appear to have been followed. See however The Proprietors of Paraninihi-Ki-Waitotara v Viking Mining Co Ltd and Others 1983 NZLR 405 (CA) which applied s.5 of the Property Law Act 1952 to Section 42.

Third: Although the deed throughout refers to the Proprietors of Te Hapua 42 the document is actually sealed with the Common Seal of Muriwhenua Incorporation despite the signatures of two persons "W Brown" and O Stensness" appearing above the name "The Proprietors of Te Hapua 42". Court records show that the name of the incorporation was changed from "The Proprietors of Te Hapua 42" to "The Proprietors of Muriwhenua" on the 9th of December 1985.

We are surprised at the apparent lack of care in the preparation of this document and this and the manner of its execution raises a concern as to whether or not the incorporation was legally advised on the form, content and effect of the assignment.

The Appellate Court again records that only the submissions and documents of the appellant have been before it in this appeal other than documents and files forming part of the Court record. The matters brought to notice are done so in the eventuality that criticism might be later directed at this Court for failure to do so particularly as the respondent Committee of Management and the incorporation itself might in some other proceedings wish to give its response.

In a letter addressed to the Appellate Court by the Secretary of Muriwhenua Incorporation on 26 August 1993 after the hearing of this appeal the incorporation claims reimbursement of costs totalling $215.90 in respect of letters addressed to the Maori Land Court. The correspondence referred to possibly included a letter handed to the Registrar on the day of hearing apologising for Mr Brown's absence and then detailing matters which appeared to be evidentiary. The Registrar was directed by the Presiding Judge that unless such evidence was to be formally presented to the Appellate Court with an application for its admission and with submission of a copy to the appellant's solicitor the Appellate Court would not receive it as a document on record. The letter was not subsequently presented. The letter dated 26 August 1993 comments that if Mr W Brown had attended the hearing further costs would have arisen. Neither the incorporation nor committee members were obliged to appear before us. In Mr Brown's case his workload and inability to get help was the reason. Whatever the reason there was no opportunity for submissions to be made which would have been helpful both to the respondents and also to the Appellate Court. The Appellate Court is not prepared to consider any application from the incorporation for costs and expenses. Returning to the factual position and the concerns expressed earlier in this decision, there remains opportunity for the respondent to answer these if the need should arise in any other proceedings. It may well be that these concerns or some of them have already been addressed in the s.61/1967 proceedings before the Court. The Appellate Court has not considered it proper to have recourse to the proceedings in that application which is still extant the lower Court even though there may have been evidentiary material answering the administrative concerns earlier expressed herein.

The Appellate Court determines that as the Muriwhenua Incorporation has already entered into and consented to an assignment of its lease dated 6 December 1975 with Northern Pulp Limited (in receivership) no effective order can be made by the Appellate Court to restrain the incorporation from that action by the issue of an order of injunction.

The appeal of Waerete Norman also known as Violet Beatrice is hereby dismissed accordingly by order under Section 56 of Te Ture Whenua Maori Act 1993.

348

On the question of costs as there has been no appearance of the respondents, no order of costs is made in their favour. The Registrar of the Maori Land Court at Whangarei is directed to refund the sum of $300 held as security for costs to the appellant care the trust account of her counsel Mr Hemi Rua Rapata.

There is a further direction that the sum of $200 held for the preparation of the record be paid to the Registrar for that purpose. Orders pursuant to Section 79 Te Ture Whenua Maori Act 1993 accordingly.

There is a further order pursuant to Section 56 Te Ture Whenua Maori Act 1993 dissolving the interlocutory injunction made on 15 July 1993.

All above orders to issue forthwith.

Finally there is a direction to the Registrar that a copy of this decision be sent to the appellant care of her solicitor; to Mr Matiu Rata; and to all members of the Committee of Management of Muriwhenua Incorporation.

This decision was delivered at Wellington this 22 day of September 1993.

A.G McHugh
(Presiding Judge)

H.K Hingston
Judge

G.D Carter
Judge