I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU
In the Māori Appellate Court of New Zealand
Taitokerau District

A20210001202

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	An appeal against a decision of the Māori Land Court made on 22 February 2021 at 226 Taitokerau MB 187-209 in respect of Kaikou H
I WAENGA I A *Between*	BARRY PEIHOPA Kaitono pīra *Appellant*
ME *And*	GLEN PEIHOPA, Chairman of the Kaikou H Ahu Whenua Trust Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	22 February 2021, 2021 Māori Appellate Court MB 187-209 12 May 2021, 2021 Māori Appellate Court MB 152-179 (Heard at Whangarei)
Kooti: *Court*	Chief Judge W W Isaac Judge M P Armstrong Judge D H Stone (Presiding)
Kanohi kitea: *Appearances*	S-M Downs and C Terei for the Appellant G Peihopa for himself
Whakataunga: *Judgment date*	25 May 2021

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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He tīmatanga kōrero

Introduction

[1] The Kaikou H Block comprises 114.8512 ha and is administered by the trustees of the Kaikou H Ahu Whenua Trust. Barry Peihopa owns 10 of the 90 shares in the block. In April 2020 he returned permanently to Aotearoa from Australia and occupied a portion of the block without consent from the trustees. After refusing to pay rent, the trustees applied for a permanent injunction to remove him from the block.[1] The Māori Land Court granted that injunction.[2] Barry Peihopa appeals that decision to this Court.

Te take

The issue

[2] The grounds for appeal are simply stated. Barry Peihopa says that the Māori Land Court erred because it applied a balance of convenience test without considering whether the granting of the injunction would be oppressive to him.

Te ture

The law

[3] The law relating to the granting of a permanent injunction per s 19(1)(a) is settled:[3]

(a) First, an applicant must prove the legal elements of trespass.

(b) Second, once the elements of trespass are made out, the court must consider whether to exercise its discretion to grant an injunction.

[4] In determining whether to exercise the discretion to grant an injunction, the following principles apply:

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[1] Per s 19(1)(a) of Te Ture Whenua Māori Act 1993.

[2] *Peihopa v Peihopa – Kaikou H Block* (2021) 226 Taitokerau MB 187 (226 TTK 187).

[3] *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* [2014] Māori Appellate Court MB 60 (2014 APPEAL 60) at [15]-[16]. See also *Pairama v Tutara Ururua 2B2* (2020) 217 Taitokerau MB 153 (217 TTK 153) at [21]; *Dawson v Young - Maungaturoto D1B* (2018) 174 Taitokerau MB 89 (174 TTK 89); and *Faulkner v Hoete - Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17) at [14].

(a) The starting point is that a landowner is entitled to an injunction to prevent a continuing trespass.[4]

(b) There is a good working rule to determine whether damages should be awarded, rather than an injunction.[5] Damages may be awarded if the injury to the applicant is small, it can be compensated by a small monetary payment, and it will be oppressive to the respondent to grant an injunction.[6]

(c) Injunctions are an equitable remedy, so equitable principles are to be considered, balanced against the statutory objectives set out in ss 2 and 17 of the Act.[7]

(d) There is no exhaustive list of factors that will be relevant to the exercise of the discretion.[8] Examples include whether the intrusion on the land is minimal, the degree of hardship if an injunction is granted, the balance of convenience, whether it will be oppressive to the respondent if the injunction is granted, whether an alternative remedy such as damages may be appropriate, and the conduct of the parties.

[5] The court must assess whether an injunction will cause disproportionate hardship to a respondent.[9] The test is one of oppression, rather than on the balance of convenience.[10] In this context, the following examples were not considered to be oppressive:

(a) The removal of a shareholder (owner) from a block.[11]

(b) The removal of an owner of a block who had lived there for his whole life with his father, on the passing of his father.[12]

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[4] *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* [2014] Māori Appellate Court MB 60 (2014 APPEAL 60) at [16].
[5] *Shelfer v City of London Electric Lightening Co* [1895] 1 Ch 287, [1891-4] ALL ER REP 838.
[6] For an example of the application of this good working rule, see *Dawson v Young - Maungaturoto D1B* (2018) 174 Taitokerau MB 89 (174 TTK 89) at [13] – [18].
[7] *O'Malley v Wyborn – Orokawa 3C2B* [2010] Māori Appellate Court MB 494 (2010 APPEAL 494).
[8] Above n 6, at [16].
[9] *Flight v Fletcher - Waipapa 1D 2B 3B* [2017] Māori Appellate Court MB 96 (2017 APPEAL 96) at [27], referring to Alistair Hudson *Equity of Trusts* (7th ed, Routledge Cavendish, Abingdon, 2013) at 1186-1187.
[10] Above n 9, at [29].
[11] *The Māori Trustee v Smith - Waipaoa 5A2* (2017) 72 Tairāwhiti MB 57 (72 TRW 57).
[12] Above n 6.

(c) The removal of baches from a block.[13]

[6] Whether to grant an injunction involves the exercise of a discretion. On appeal, we are not required to consider this case afresh and arrive at our own decision about how we would have exercised the discretion. We have a more limited role. We can only intervene if we are satisfied that the Māori Land Court acted on an error of law or a wrong principle, failed to take into account a relevant consideration, took into account an irrelevant consideration or was plainly wrong.[14]

Ngā kōrero o te kaipīra

Submissions for the appellant

[7] The appellant says:

(a) The lower Court applied the balance of convenience test without considering whether the injunction would be oppressive to him. Further, the legal requirements for the granting of an injunction were not referenced in the lower Court's decision.

(b) The injunction is oppressive to him. He is a kaumātua of his whānau, hapū and community. The injunction renders him homeless. There are physical challenges for him to find another place to stay at short notice. Having to move causes him stress.

(c) The lower Court did not assess the comparative hardship for the trustees if an injunction were not granted. If it had, the good working rule should have been applied, meaning that damages were a more appropriate remedy.

(d) In any event, the lower Court decision is plainly wrong. The injunction causes him hardship and injustice and, in reliance on *Flight v Fletcher*, should not have been granted.[15]

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[13] *Kemp – Pouto Tōpū A* (2012) 51 Taitokerau MB 277 (51 TTK 277).
[14] *Nikora v Te Uru Taumata Trust* (2020) Māori Appellate Court MB 248 (2020 Appeal 248) and *Hohepa v Piripi – Waima C30A and Waima Topu Blocks* (2019) Māori Appellate Court MB 629 (2019 Appeal 629), both citing *Kacem v Bashir* [2010] NZSC 112.
[15] Above n 9.

Ngā kōrero o ngā kaiurupare

Submissions for the respondents

[8] The respondent, as chairman of the trustees, says:

(a) Although there is some hardship associated with the appellant having to vacate the block, it is of his own doing. He was provided with multiple opportunities to pay a reasonable amount to reside on the block. He refused to do so and challenged the authority of the trustees to even request it.

(b) The trustees followed due process. They have done everything by the book, including giving the appellant two opportunities to pay rent to remain on the block. It was his choice to refuse to make payment.

(c) The appellant did not submit any evidence before the lower Court regarding the effects on him if an injunction were granted. He did not say at the time that an injunction would be oppressive to him.

(d) The trustees have suffered hardship. They volunteer their time to the trust at the expense of spending time with their own immediate whānau.

Kōrerorero

Discussion

[9] In his evidence before the lower Court, the appellant did not set out the effects on him if the injunction were granted. He explained why he had moved onto the block, but he did not say what would happen to him if he was required to leave.

[10] Further, in their notice to appear in the lower Court, the appellant's counsel did not argue that the granting of an injunction would be oppressive to the appellant. They did argue that an injunction would be oppressive to any new incoming trustees. It is difficult to understand this argument, as it assumes new trustees would be appointed at some stage in the immediate future and that an injunction would somehow be difficult for them to deal with. But that argument is a red herring, because it is oppressiveness for the appellant that is relevant, and no such oppression was argued before that Court.

[11] Nor was oppressiveness argued at the hearing.[16] The statement that comes closest to alleging oppression is counsel for the appellant submitting that "the prejudice to be suffered by the [appellant] should the injunction be granted, seriously, is very serious and would have implications for [him]". Even if this statement were to be interpreted as an allegation that an injunction would be oppressive to the appellant, it does not say why, and nor was it supported by evidence.

[12] The appellant has not sought to adduce further evidence in this appeal. Counsel for the appellant submitted that the granting of the injunction was oppressive to the appellant for various reasons. The problem is that these reasons are not supported by evidence, either in the lower Court or before us. Counsel for the appellant properly conceded during the hearing that we cannot take account of any grounds for oppression, as none were put forward at first instance and no further evidence has been adduced before us.

[13] We conclude that oppressiveness for the appellant was not raised as an issue at first instance. It follows that the lower Court did not err because it failed to consider oppressiveness to the appellant in granting the injunction.

[14] Counsel for the appellant further submitted that it was not necessary for the appellant to produce evidence of oppression, as the lower Court should have taken these matters into account in applying the law relating to injunctions. We disagree. The Court cannot simply make these matters up. The appellant should have put these matters in evidence. We are also reminded of this Court's comments that it is not for the Court to remedy deficiencies in the case presented.[17]

[15] Also, although the lower Court did not refer expressly to the good working rule when determining whether damages would be a better remedy than an injunction, it is clear that this aspect was taken into account. Indeed, the very solution proposed by the appellant at first instance involved the payment of money in lieu of an injunction. We are therefore satisfied that the lower Court assessed whether damages should be awarded instead of an injunction.

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[16] See in particular *Peihopa v Peihopa – Kaikou H Block* (2021) 226 Taitokerau MB 187 at 200-205.

[17] *Bratton v Le Lievre – Muriwhenua Incorporation* [2017] Māori Appellate Court MB 351 (2017 APPEAL 351) at [46], referring to *Far North District Council v Maihi – Maungakawakawa 5G* (2013) 52 Taitokerau MB 138 (52 TTK 138) and *Ratahi v The Māori Land Court* [2014] NZAR 723.

[16] Finally, as set out above, in determining whether to grant a permanent injunction the starting point is whether the Trustees were entitled to an injunction to prevent a continuing trespass. This is not disputed by the appellant. Next, it has not been demonstrated by the appellant that the lower Court incorrectly exercised its discretion or that the decision was plainly wrong. Accordingly, the appeal fails.

Whakataunga

Decision

[17] The appeal is dismissed.

[18] The respondents were not legally represented. Therefore, there is no order as to costs.

I whakapuaki i te 10.00 am i Te Whānganui a Tara, rua tekau mā rima o ngā rā o Haratua te tau 2021.

W W Isaac	M P Armstrong	D H Stone
CHIEF JUDGE	**JUDGE**	**JUDGE**