IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20170002872

UNDER	Section 58 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Motiti North C No 1
BETWEEN	LIZA FAULKNER Appellant
AND	GRAHAM HOETE AND AUDBREY HOETE Respondents

Hearing: On the papers

Court: Deputy Chief Judge C L Fox
Judge L R Harvey
Judge M P Armstrong

Appearances: M Sharp for Appellant
K Feint for Respondents

Judgment: 2 August 2017

JUDGMENT OF THE COURT

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Introduction

[1] On 14 March 2017 the Māori Land Court granted a permanent injunction requiring Liza Faulkner to remove a partially constructed dwelling situated on Motiti North C No 1. Ms Faulkner now appeals that decision. Her appeal has been set down for hearing on 8 August 2017.

[2] On 24 July 2017, Mr Sharp, counsel for Ms Faulkner, filed an application seeking leave to file further evidence, per r 8.18 of the Māori Land Court Rules 2011. The application to adduce further evidence is opposed by Graham Hoete and Aubrey Hoete.

Issue

[3] The issues for determination are whether the applications to file further evidence out of time should be granted.

Background

[4] The injunction issued by Judge Clark on 14 March 2017 was granted on the basis that the applicants had been ousted from being able to use part of the block as an airstrip, as provided for in the District Plan. The learned Judge concluded that the applicants were entitled to use part of the block as an airstrip as this was a permitted activity under the plan.[1]

Appellant's submissions

[5] Mr Sharp submits that the affidavit sought to be filed updates the situation with events that have taken place since the hearing in the Court below regarding ongoing discussions with the Department of Internal Affairs (DIA) over the planning status of the dwelling and airstrip.

[6] Counsel argues that leave is sought per r 8.18(2) on the basis that the further evidence may be necessary to reach a just decision given that Judge Clark stated that a factor in reaching a decision to grant an injunction has been the past record of the DIA as the relevant territorial authority in taking action about planning related complaints and queries raised by the residents of Motiti Island.

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1 *Hoete v Faulkner – Motiti North C No 1 Block* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278)

[7] In addition, Mr Sharp submits that the further evidence is necessary given that the appellant has appealed against the decision upon the basis that the planning issues should be left to the appropriate processes under the Resource Management Act 1991, which initially involve the DIA investigating and determining the planning status of the relevant activities.

[8] Counsel contends that on this basis the new evidence is fresh evidence on the issue that will be relevant to this Court's decision.

[9] Mr Sharp applies per r 2.4(2) to excuse compliance with r 8.18(3) which requires an application of this kind must be filed no less than one month before the hearing of the appeal. He argues that compliance should be excused in the circumstances given that the affidavit is filed at the same time as the filing of submissions in support of the appeal.

Respondents' submissions

[10] Ms Feint, for the respondents, confirms that the application for leave to file further evidence and for leave to file late is opposed.

[11] She argues that the evidence sought to be admitted is not an "update", as is asserted, and on the contrary is entirely new. The evidence concerns the appellants' efforts to vary the District Plan, or find some way, around r 3.2.5 of the Plan which prohibits buildings being erected along the alignment of any existing airstrip.

[12] Ms Feint submits that Judge Clark directed the DIA to give evidence concerning the status of the District Plan, and relevant rules within that plan. That evidence included information on the process to change the District Plan. No further update is required.

[13] In addition, counsel submits that the evidence is irrelevant to the issues on appeal. The evidence relates to the appellant's intention to seek a variation of the District Plan and includes notes that purport to record advice on a number of legal issues concerning the airstrip. Such information, Ms Feint argues, is irrelevant. The legal position is a matter for submission, not hearsay.

[14] Ms Feint contends that whether the appellant will succeed with her intention to change the District Plan is entirely speculative and the possibilities for effecting that change are irrelevant to the issues on appeal.

[15] Further, counsel submits that the District Plan is operative and rules within it have force and effect. She argues that it is axiomatic that this Court must apply the law as it currently stands.

[16] Ms Feint argues that the evidence is hearsay and the Court has no way of knowing whether it is an accurate record of information provided by DIA officials, or what their intentions are. Counsel contends that the "minutes" of the Faulkner whānau meeting with the DIA are not in fact confirmed minutes of a meeting but merely notes made by a member of the whānau of what they understood DIA officials had said to them. The Court cannot safely rely on these notes.

[17] Counsel also submits that r 8.18(3) requires the application to be filed at least one month before the hearing that is by 8 July at the latest. Instead, the application was filed on 24 July. Counsel for the respondent was not provided with the affidavit until 24 July even though it was sworn on 21 July. Ms Feint argues that as the meeting with the DIA was held in May there is no apparent reason why the application has been made so late.

[18] Counsel submits that the respondents were unaware of the meeting or the intention to call a landowners' hui and it is unfair for evidence to be filed concerning discussion with the DIA when they met with only one party to the dispute.

[19] Ms Feint submits that filing the application with less than five days before the respondents' submissions are due prejudices the respondents' ability to reply.

The Law

[20] Rule 8.18 of the Māori Land Court Rules 2011 provides:

> **8.18 Hearing of further evidence**
>
> (1) The parties to an appeal may not adduce further evidence at the hearing of the appeal but are restricted to the evidence recorded as adduced before the Court that made the order or determination appealed from.
>
> (2) However, the Māori Appellate Court may grant leave to a party to adduce further evidence if it is satisfied that the further evidence may be necessary for it to reach a just decision.
>
> (3) An application for leave to adduce further evidence must—
>
> > (a) be filed and notified to the other parties to the appeal not less than 1 month before the hearing of the appeal; and

(b) clearly disclose the nature and the form of the evidence to be adduced.

[21] Rule 2.4 is also relevant:

> **2.4 Complying with these rules**
>
> (1) The Court must ensure compliance with these rules.
>
> (2) However, in a particular case the Court may excuse compliance with a rule if it is satisfied, having regard to the matters listed below, that compliance would be oppressive or otherwise inappropriate:
>
> (a) the purpose of the rule:
>
> (b) the consequences of the non-compliance for a party or any other person affected by it:
>
> (c) the fairness of requiring compliance or otherwise.
>
> (3) Non-compliance with a rule does not in itself invalidate any proceeding or step in a proceeding, or document, decision, or order issued or made, under these rules.
>
> (4) Unless the Court has excused non-compliance with a rule, the Court may at any time in a proceeding—
>
> (a) set aside the proceeding for non-compliance; or
>
> (b) make any other appropriate order for addressing the non-compliance.
>
> (5) Nothing in this rule prevents an application or an appeal to a court of competent jurisdiction or an application to the Chief Judge under section 45 of the Act challenging the validity of an order of the Court on the ground of non-compliance with these rules.

[22] In *Hoko – Papamoa 2A1* this Court referred to the orthodox approach to reception of evidence on appeal set out in *Dragicevich v Martinovich*:[2]

> Three tests must be met.
>
> (1) It must be shown the evidence could not have been obtained with reasonable diligence for use at trial
>
> (2) The evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive, and
>
> (3) The evidence be such as is presumably to be believed although it need not be controvertible.

[23] This Court confirmed that the principles in *Dragicevich v Martinovich* had been adopted in previous decisions, even though exceptions to the principles had been made. Such exceptions included circumstances which would lead to dispossession of Māori owners for a

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[2] (2003) 20 Waikato Maniapoto Appellate Court MB 167 (20 APWM 167)

lengthy period of time and where an Appellate Court hearing would be a final determination, and also where the appellant was misled in the Court below as to the ability to produce the relevant evidence and where the subsequent appeal was unopposed.[3]

[24] In its decision *Erceg v Balenia Ltd* the Court of Appeal confirmed the conventional approach to adducing further evidence:[4]

> … [T]he requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial: *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 192 (CA). Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal: *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

[25] The following principles are also applicable:[5]

(a) Litigants have a duty to adduce at trial all their evidence, reasonably discoverable.

(b) The constraints on the admission of further evidence are very strict. Evidence which is not fresh should only be admitted in exceptional and compelling circumstances, and will also need to pass the tests of credibility and cogency.

(c) While a balancing of the interests of the applicant and opposing parties is required, the aim is to ensure that parties put their best case at trial and that the public resources of the Court system are not wasted.

Discussion

[26] The evidence sought to be adduced is an affidavit providing a copy of minutes of a hui held on 26 May 2017 with the appellant's whānau and the DIA. It is said that these documents essentially provide an "update" to the Appellate Court regarding the appellant's attempts to bring about a District Plan change.

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3 See *White – Maketu A2A Lot 4 DPS 63036* (1999) 1 Waiariki Appellate Court MB 116 (1 AP 116) and *Te Haki v Board of Maori Affairs – Motatau 5J2B* (1963) 1 Taitokerau Appellate Court MB 182 (1 APWH 182)

4 [2008] NZCA 535

5 *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA).

[27] As Ms Feint has pointed out Judge Clark called for evidence from the DIA. The planning issue was squarely before the Court. In our assessment, the further evidence sought to be filed is unlikely to take the point any further.

[28] We agree with Ms Feint that the evidence sought to be adduced is speculative. It is not evidence of a plan change that has occurred since the judgment of the Court below and nor is it conclusive evidence that a plan change will in fact occur. We point out that at [8] of the affidavit the appellant herself confirms that the DIA has not provided any response. To that end we find that the evidence is not credible or cogent.

[29] We note further that if a plan change did occur, it is always open to the appellant to file a fresh application with the Court below seeking to have the injunction cancelled. This cannot be done by way of appeal.

[30] In addition, the application is filed out of time being less than two weeks before the hearing and contravenes r 8.18(3). We do not consider that there is any proper basis to excuse compliance with that rule in this case.

[31] For these reasons the application to file further evidence is dismissed.

Decision

[32] The applications for leave to file further evidence out of time are dismissed.

[33] Costs are reserved.

Pronounced at 2.15pm in Wellington this 2nd day of August 2017

C L Fox **DEPUTY CHIEF JUDGE** (Presiding)	L R Harvey **JUDGE**	M P Armstrong **JUDGE**