IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20160004206
APPEAL 2016/4

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal against a decision of the Māori Land Court made on 12 May 2016 at 352 Aotea MB 211 in respect of WAIPAPA 1D 2B 3B
BETWEEN	LESLIE ERLE FLIGHT Appellant
AND	SHARON FLETCHER, DAVID FLIGHT, TE MIHIATA HAKIWAI-WHAANGA, RAWIRI HEREMAIA, KATARAINA PITIROI, MIKAERE PITIROI, AND AMY WALKER AS TRUSTEES OF THE WAIPAPA AND TOKAANU MĀORI LANDS TRUST Respondents

Hearing:	8 November 2016 (Heard at Whanganui)
Court:	Judge P J Savage (Presiding) Judge S Te A Milroy Judge M J Doogan
Appearances:	R Mullins for the appellant J Koning for the respondents
Judgment:	12 May 2017

JUDGMENT OF THE MĀORI APPELLATE COURT

Copies to:
R Mullins, McCaw Lewis Lawyers, DX GP20020, Hamilton 3240, rachel.mullins@mccawlewis.co.nz
J Koning, Koning Webster Lawyers, P O Box 11120, Papamoa 3151, john@kwlaw.co.nz

Introduction

[1] For close to 30 years Mr Flight has been living in a house on Māori Freehold land administered by the Waipapa and Tokaanu Māori Lands Trust. Previously his parents and grandparents had occupied the house. Mr Flight cares for a dependent son with a chronic illness and cannot afford to live elsewhere.

[2] In May 2016 Judge Harvey granted the trust a permanent injunction requiring Mr Flight to remove the dwelling.[1] The Judge described it as a very difficult decision.

[3] Mr Flight appeals that decision. The central issue on appeal is whether the injunction should have been refused because it was oppressive.

Background

[4] Waipapa 1D 2B 3B block is Māori freehold land, 148.0314 ha in area. It was created by partition order on 30 August 1963 and there are currently 234 owners.[2] The block is administered by two ahu whenua trusts. Te Kawakawa Ahu Whenua Trust administers 107.7273 ha of the block and was constituted on 21 March 1983.[3] The remaining 40.3041 ha of the block is administered by the Waipapa and Tokaanu Māori Lands Trust ("the Trust"). Mr Flight's home is on this block.

History of occupation and dealings

[5] Sometime between 1920 and 1930, Mr Flight's great grandfather, Petera Te Rangi built a house on the land. When he passed away in 1950, his wife Meri Te Rangi continued to occupy the house until her death in 1969. Petera Te Rangi's seven children succeeded to his land interests in Waipapa 1D 2B, including Te Aonini who is Mr Flight's grandmother.[4]

[6] On 28 March 1962, an order was granted by the Court per s 440 of the Māori Affairs Act 1953 for a dwelling site on Waipapa 1D 2B 3 (the parent block) in favour of

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1 *Walker and others v Leslie Earl Flight* (2016) 352 Aotea MB 211 -232 (352 AOT 221-232).
2 42 Tokaanu MB 327-329 (42 ATK 327-329).
3 65 Tokaanu MB 195-196 (65 ATK 195-196).
4 29 Tokaanu MB 556-557 (29 ATK 556-57).

Erle and Ngahau Flight; Mr Flight's parents.[5] It is not clear whether this order related to the existing house or another unspecified site on the land. They took no steps under the order, and in 1974 began occupying the house built by Petera Te Rangi until their separation in 1987. Mr Flight then moved into the house and has remained there since.

[7] Discussions between the Trust and Mr Flight regarding his occupation and ownership of the house began in 2008. In 2009, a letter from the Trust's chairman was sent to Mr Flight confirming permission for Mr Flight's continued occupation on certain conditions, including the payment of rates.

[8] In 2011, Mr Flight filed an application per s 18(1)(a) of the Act for a determination of the ownership of the house. A competing application for ownership was filed by his father, Erle Flight, in 2012. The Trust opposed both applications and also sought the cancellation of the s 440 order granted to Erle and Ngahau Flight in 1962.

[9] As part of the determination of ownership proceedings, Mr Flight and the Trust entered into negotiations regarding a settlement agreement, which was agreed and drafted in 2012. However, the Trust subsequently received a report from First Inspections Ltd, licensed building practitioners, raising concerns over the habitability of the house. As a result, the settlement agreement was not finalised.

[10] On 17 February 2014, the Court issued its decision determining the ownership of the house in favour of Mr Flight. The s 440 order granted to Erle and Ngahau Flight was cancelled.[6]

[11] On 21 March 2014, the Trust sent a letter to Mr Flight advising that the trustees had resolved not to grant Mr Flight a licence or other authority to occupy the site, and would not consent to an occupation order. They gave notice that he was to cease residing in his house on the land by 27 June 2014 and that he was to remove or demolish the dwelling by 30 September 2014.

[12] Mr Flight did not vacate his house or the land and the trustees filed the application for a permanent injunction on 2 October 2014.

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5 41 Tokaanu MB 206 (41 ATK 206).

6 *Flight v Trustees of Waipapa and Tokaanu Māori Lands Trust* (2014) 316 Aotea MB 3 (316 AOT 3).

The argument for Mr Flight

[13] Ms Mullins argued that the lower Court failed to properly assess the appropriateness of damages as an alternative remedy in terms of the "good working rule" set out in *Shelfer v City of London Electric Lighting Company*.[7] She says that the injury or harm to the trustees was minimal at best, the area occupied by the appellant was small and unlikely to generate any significant income for the Trust, there was no interference with the principal lease, and, as the appellant pays the rates on his site, there is no financial loss to the Trust.

[14] Ms Mullins argued that the Court erred in the exercise of its discretion and failed to consider the specific circumstances in this case of why and how the appellant and his whānau came to occupy the land for over 50 years. She says that the lower Court Judge should have placed appropriate weight on the relevant equitable considerations and balanced those against the statutory objectives in the Act. Specifically, the Court should have taken into account the conduct of the parties and the unreasonable stance taken by the trustees, along with the significant oppression and hardship that would be suffered by the appellant should the injunction be granted. The failure of the lower Court to give due consideration to those matters is the basis of the appeal.

The argument for the Trustees

[15] Mr Koning submitted that the appellant must show that, in exercising its discretion under s 19 of the Act, the lower Court either: applied the wrong test; failed to take into account relevant considerations, or took into account irrelevant considerations; or that its decision was plainly wrong.

[16] He submitted that there was no error of law or principle in the decision of the lower Court. The Court considered whether the elements of trespass had been established and then whether a permanent injunction was the appropriate remedy, noting that it was a discretionary remedy. The relevant factors recorded by the Court as to the exercise of its discretion were the objects of the Act and the issue of damages, conduct of the parties and potential hardship. The lower Court considered those issues along with alternative

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[7] *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287, [1891-4] ALL ER REP 838.

remedies, and then carefully balanced those relevant considerations before issuing judgment in favour of the respondents.

[17] Mr Koning says that the respondents sought and were granted a permanent injunction against the appellant for his continuing trespass on Waipapa 1D2B3B. He contended that, on that basis, the decision cannot be plainly wrong. The respondents were enforcing their rights as the registered proprietors and discharging their obligations under the trust order and the Act.

The Law

[18] The differences (if any) between the parties as to the legal principles to be applied by this Court were small, but we nonetheless set them out for the purposes of explaining how we must proceed.

[19] The granting of an injunction is a discretionary remedy. In terms of the role of this Court, it is basic that the discretion is granted to the lower Court and not to us. It is not relevant that we may have exercised the discretion differently. If we are to overturn the exercise of a discretion, it must be on a principled basis and not simply that we would have dealt with the matter differently.

[20] The principles upon which we must act are those referred to in *Harris v McIntosh*[8]:

> "…an appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong."

[21] That approach was referred to in *Kacem v Bashir*:[9]

> But, for present purposes, the important point arising for *Austin, Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal

[8] *May v May* (1982) 1 NZFLR 165 at 170, as cited in *Harris v McIntosh* [2001] 3 NZLR 721 at [13].
[9] *Kacem v Bashir* [2010] NZSC 112 at [32].

> from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision. The decision of the High Court was a matter of assessment and judgment not discretion, and so was that of the Family Court.

[22] Counsel for both parties accepted that there is a "good working rule" to be considered when a Court is deciding whether to grant an injunction or whether damages are an appropriate remedy. The rule was established in *Shelfer v City of London Electric Lighting Co*[10] and has been adopted and approved by New Zealand courts, including this Court, and will be discussed in the next section of this judgment.

[23] Discretions are usually to be considered in terms of guidance available from enabling statutes. The Maori Land Court has a duty under s 2 of Te Ture Whenua Maori Act that, when exercising powers, duties and discretions under the Act, they:

> Shall be exercised in so far as possible to promote the retention, use, development and control of Maori land as a taonga tuku iho by Maori owners.

[24] Section 17 defines the primary objective of the Court as being to promote and assist in the retention of Maori land and the effective use, management and development of that land by or on behalf of the owners. Subsection 2 sets out further objectives that the Court must seek to achieve when exercising its powers under the Act. The Appellant points out that the following objectives of s 17(2) are important in this case:

> (d) protect minority interests in any land against an oppressive majority…;
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> (e) ensure fairness in dealing with the owners of any land in multiple ownership; and
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> (f) promote practical solutions to problems arising in the use or management of any land.

[25] The Appellant argues that there is no reference to s 2 or s 17 at all in the lower Court's judgment. Certainly there is no explicit reference to those sections, however we note that, at paragraph 32 of the judgment under appeal, the Judge cited to an earlier decision of this Court and noted that it had been held that statutory objectives found in the Act must be given consideration if not precedence in relation to the exercise of discretion.

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[10] Above n 7.

[11] There is no further reference to this within the judgment, but we do not see this as a material error.

Did the Judge below err in his application of the law to the facts?

[26] The judge clearly did take into account the relevant factors, and weight has not been given to irrelevant considerations. The parties do not argue otherwise.

[27] Before granting a permanent injunction, the Court must be satisfied that the grant of the injunction would not cause disproportionate hardship to the respondent. Professor Hudson puts it this way:[12]

> The issue for the Court will typically be resolved in a comparison of the comparative hardship to the applicant if the injunction is not granted, and the likely hardship to the respondent if the injunction is granted.

[28] In *Jaggard v Sawyer* the English Court of Appeal considered the principles applicable to the grant of a final injunction.[13] Millett LJ said:[14]

> … references to the 'expropriation' of the plaintiff's property are somewhat overdone, not because that is not the practical effect of withholding an injunction, but because the grant of an injunction, like all equitable remedies, is discretionary. Many proprietary rights cannot be protected at all by the common law. The owner must submit to unlawful interference with his rights and be content with damages. If he wants to be protected he must seek equitable relief, and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course, but this is not always the case, and it will never be granted if this would cause injustice to the defendant.

[29] In the same case Sir Thomas Bingham M R stated that:[15]

> It is important to bear in mind that the test is one of oppression, and the Court should not slide into application of a general balance of convenience test.

[30] We noted above the reliance counsel placed upon what is known as the "good working rule" laid down by AL Smith L J of the English Court of Appeal in *Shelfer v City of London Electric Lighting Company*. In that case Smith L J held:[16]

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[11] *O'Malley v Wyborn – Orokawa 3C2B* [2010] Maori Appellate Court MB 494 (2010 APPEAL 494) at [31]-[36].
[12] Alistair Hudson *Equity of Trusts* (7th ed, Routledge Cavendish, Abingdon, 2013) at 1186-1187.
[13] *Jaggard v Sawyer* [1995] 2 ALL ER 189.
[14] Above n 13 at 207.
[15] Above n 13 at 203.

> So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion, it may be stated as a good working rule that – (1.) If the injury to the plaintiff's legal rights is small, (2.) And is one which is capable of being estimated in money, (3.) And is one which can be adequately compensated by a small money payment, (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction: - then damages in substitution for an injunction may be given.

How did the Court below apply these principles?

[31] When considering the conduct of the parties and hardship or potential oppression to Mr Flight, the Judge made reference to the following factors. There is no challenge on appeal to the relevance or accuracy of these matters. We summarise them below, paraphrasing from the judgment under appeal:

a) The occupation by Mr Flight and his whānau has been longstanding over several generations without apparent serious opposition from the owners or their representatives, until recently.[17]

b) The trustees have sat on their rights for an extended period while the occupation was ongoing, and the impact of the occupation on the Trust and its beneficiaries appears inconsequential.[18]

c) It seems unduly harsh and inconsistent with the role of the trustees to remove whānau from their land where they have an interest according to tikanga, and in circumstances where Mr Flight and his whānau have been in occupation for many years without serious challenge and without causing significant economic loss to the Trust.[19]

d) Mr Flight and his whānau are not rāwaho – outsiders or strangers to the land with no real connection or link.[20]

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[16] Above n 7.
[17] *Walker v Flight – Waipapa 1D 2B 3B* (2016) 352 Aotea MB 211 (352 AOT 211).
[18] Above n 16.
[19] Above n 16 at [69].
[20] Above n 16 at [69]. We note that, by the time the matter was argued before us, Mr Flight was in fact a beneficial owner in the land, having removed his interests from the Te Aonini Petera Heremara Whanau Trust.

e) The hardship caused to Mr Flight by the granting of a permanent injunction would be real and consequential. If removed, he and his son will have nowhere to go.[21]

f) Mr Flight cannot afford to remove the dwelling even if he wished to do so. As such, the costs of removal would fall to the owners through trustees. The gain to the Trust of an extra 1,500 sqm of land from a 40 ha block "hardly seems worth a candle." It is therefore difficult to see that such an action and the incurring of such expense would necessarily be prudent.[22]

g) If Mr Flight is forced to leave he will have nowhere to live for himself or his son, who he says suffers from a serious illness.[23]

[32] In terms of possible hardship to the Trust if the injunction was not granted, the Judge had regard to the following matters (again, paraphrased from the judgment):

a) The trustees are the legal owners of the land and have the right to determine who may occupy. That right must be balanced against the objectives in the trust order, including the duty to provide for dwelling sites. Nonetheless, the trustees have the right to prioritise often scarce resources as custodians and are not obliged to achieve all of their objectives at any one time.[24]

b) At law the trustees are entitled to free and unencumbered use and possession of the trust property to use as they see fit in accordance with their duties to the beneficiaries and, in particular, their duty of prudence and impartiality. Permitting Mr Flight to remain without securing some form of return may leave trustees open to challenge from owners that they are not acting prudently and are favouring one owner over the rest.

[21] Above n 16 at [71]-[72].
[22] Above n 16 at [85].
[23] Above n 16 at [85].
[24] Above n 16 at [73].

> They may also be faced with similar conduct from owners and their whānau simply occupying the land without consent from the trustees.[25]

[33] In the concluding section of the decision, the learned Judge weighs up the various arguments for and against the granting of an injunction. He begins by noting that it is a very difficult case to decide, with neither party wholly with or without responsibility for what has occurred. He then reviews in an even handed way the respective interests of the parties. He concludes:[26]

> In summary, it is evident that the peculiar set of circumstances in this case has rendered the issuing of a final decision from this Court, very difficult. Nonetheless I regret the delay in the issuing of this judgment in favour of the trust.
>
> Having regard to the overall circumstances of this case, the position of the respective parties and their conduct, I accept the argument, by a very narrow margin, that the application for a permanent injunction should now be granted.

[34] When finally concluding by "a very narrow margin" that the trustees are entitled to the grant of a permanent injunction, the learned Judge has moved away from deciding whether or not the granting of an injunction would be oppressive to Mr Flight towards something like a balance of convenience test. This is the approach Lord Bingham warns against in the *Jaggard* case.

[35] What is required is an assessment one way or another as to whether or not the grant of an injunction would be oppressive. Rather than specifically decide that issue, however, the learned Judge instead balances those factors against the countervailing rights of the Trustees.

[36] In the alternative, if we are wrong on that view we would allow the appeal on the grounds that the decision is plainly wrong. The grant of a permanent injunction in the circumstances of this case would, in our view, be oppressive and cause an injustice to Mr Flight. We see that as the conclusion which follows from a review of the facts recorded in the judgment under appeal (and set out above at para 32).

[37] Applying the "good working rule" from the *Shelfer* case to these facts it is clear that:

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[25] Above n 16 at [86].
[26] Above n 16 at [88]-[89].

1) the injury to the plantiffs legal rights is small (1,500m^2 of a 40 hectare block);

2) it is capable of being estimated in money;

3) it can be adequately compensated by a small money payment; and

4) it would be oppressive to Mr Flight to grant the injunction and require him to remove the house. He has lived there for nearly 30 years, cares for a dependent son, and has nowhere else to go.

[38] This is in fact substantially the reasoning adopted by the learned Judge. The principal error as we see it was a failure to squarely address the oppression issue. The balancing exercise that was adopted led to a decision to exercise discretion to grant the injunction in circumstances where it was wrong to do so because it was oppressive.

Decision

[39] The Appeal is granted.

[40] There is an order pursuant to s 56(1)(b) revoking the order made by Judge Harvey on 12 May 2016 at 352 AOT 211-232 at 232.

[41] Both parties were represented by Counsel and, in the normal course, costs would follow the event. If the parties cannot agree, Counsel for the applicant may submit a memorandum within 15 working days of receipt of this judgment. Counsel for the respondent may reply within 15 working days of that date.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

P J Savage (Presiding) **Judge**	S Te A Milroy **Judge**	M J Doogan **Judge**