IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20160006165
APPEAL 2016/8

UNDER	Section 58 of Te Ture Wheuna Māori Act 1993
IN THE MATTER OF	Kawerau A8 D Block - an appeal against a reserved judgment at 146 Waiariki MB 281-343
BETWEEN	KANI HUNIA Applicant
AND	COLLEEN SKERRET-WHITE AND TOMAIRANGI FOX First Respondent

Date: 30 March 2017

REASONS OF THE MĀORI APPELLATE COURT

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Introduction

[1] On 30 January 2017 the Māori Appellate Court vacated the hearing of the above appeal scheduled for 9 February 2017, on the grounds that the Māori Appellate Court lacked jurisdiction to hear the appeal because the lower Court decision was not a final order of that Court. We stated that the reasons for the decision would follow.[1] This judgment sets out the reasons of the Court.

Background

[2] On 31 August 2016, in a lengthy judgment traversing multiple grounds, Judge Harvey found that Mr Hunia and the other trustees of Kawerau A8D had failed to carry out their duties satisfactorily, sufficient to warrant removal.[2] In relation to the removal, Judge Harvey stated:[3]

> Given the adverse findings that have been made, it may be appropriate for those trustees who have been removed to serve a period of ineligibility for any future appointment, should they seek to stand for election at some future date. That said, I acknowledge the argument that some may find permanent ineligibility too onerous an outcome. It may be necessary that those persons directly affected are deemed ineligible for appointment for a finite period of time. The parties should file submissions on this issue within one month from the date of this judgment. It is likely to be appropriate that the matter is also discussed at the next general meeting of owners.

[3] The trustees were removed, but invited to file submissions (within 2 months) on whether or not this removal should be indefinite or for a set term of disqualification.[4] At the beginning of the judgment, Judge Harvey had prefaced this conclusion by stating:

> [6] The issue of any post removal eligibility for re-election and re-appointment is also considered in this judgment by way of request for further submissions on the point *before any final decision is taken*. [Emphasis added]

[4] On 2 November 2016, Mr Hunia appealed the decision, rather than choosing to file submissions on the permanence of removal. It should be noted that the other trustees who were removed did file submissions with the Court as to their trusteeship.

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1 *Hunia v Skerrett-White – Kawerau A8D Block* [2017] Māori Appellate Court MB 6 (2017 APPEAL 6).
2 *Hunia v Skerrett-White – Kawerau A8 D Block* (2016) 146 Waiariki MB 281 (146 WAR 281) at [202].
3 At [203].
4 At [222].

[5] In his appeal Mr Hunia submitted that the Court had erred in law by not providing him with the opportunity to be heard on matters that were ultimately highly relevant, and also challenged the overall finding that he had failed to carry out his duties as a trustee satisfactorily.

[6] On 17 January 2017, the Māori Appellate Court issued a direction requesting the Appellant's submissions on whether or not Judge Harvey's decision of 31 August 2016 was a final order or a provisional order of the Court, and whether the Māori Appellate Court had jurisdiction to hear the appeal in the manner filed.[5] The submissions were received on 27 January 2017.

[7] Following consideration of the submissions, on 30 January 2017 the Māori Appellate Court issued a minute informing parties that it had no jurisdiction to hear the appeal; the lower Court decision was not a final decision of the Court. Reasons were reserved and are set out below.

The Law

[8] The Māori Appellate Court has jurisdiction to hear appeals made against a final order or a provisional/preliminary determination of the Māori Land Court, in terms of the following sections of Te Ture Whenua Māori Act 1993 (the 1993 Act):

> **58 Appeals from Maori Land Court**
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> Except as expressly provided to the contrary in this Act or any other enactment, the Maori Appellate Court shall have jurisdiction to hear and determine appeals from any final order of the Maori Land Court, whether made under this Act or otherwise.
>
> […]
>
> **59 Appeals from provisional determinations**
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> (1) By leave of the Maori Land Court, but not otherwise, an appeal shall lie to the Maori Appellate Court from any provisional or preliminary determination of the Maori Land Court made in the course of any proceedings.
> (2) Any such appeal may be brought by or on behalf of any person who is materially affected by the determination appealed from, or who would be bound by an order made in pursuance of it.
> (3) The Maori Land Court may decline leave where it is satisfied that the interests of justice and of the parties would best be served by completing the proceedings before any appeal is made to the Maori Appellate Court.

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5 *Hunia v Skerret-White – Kawerau A8D Block* [2017] Māori Appellate Court 2 (2017 APPEAL 2).

> (4) When leave to appeal is so given, the Maori Land Court may either stay further proceedings in the matter or continue the same, but no final order shall be made until the appeal has been finally disposed of or dismissed.
> (5) When any such appeal has been determined by the Maori Appellate Court, no further appeal shall lie at the suit of any person from any final order made in those proceedings by the Maori Land Court, so far as the order conforms to the determination of the Maori Appellate Court.
> (6) Where no leave to appeal is sought against any provisional or preliminary determination by the Maori Land Court in any proceedings, the Maori Appellate Court may decline to hear any appeal against the final order of the Maori Land Court made in those proceedings if it is satisfied that the appellant had a reasonable opportunity to appeal against the provisional or preliminary determination and that the point that would be in issue on the appeal is substantially the same as that to which the provisional or preliminary determination related.

[9] In *Hau v Foy & Ors – Te Kaha 20B*,[6] the Court held that appeals under s 59 requires the leave of the Māori Land Court. Where no leave is granted, the Appellate Court has no jurisdiction to resolve arguments in relation to a preliminary determination.[7]

[10] In the present case, the appellant sought to appeal under s 58, not s 59. No leave to apply under s 59 has been sought or granted. Accordingly, we put to one side the question of whether or not the decision constituted a provisional or preliminary determination and consider only cases that discuss the meaning of a final order of the Court. Thus, the issue to determine is whether or not Judge Harvey's decision of 31 August 2016 was a final order of the Court.

When is an order a final order?

[11] Under the Māori Affairs Act 1953 (the 1953 Act), when determining whether an order of the lower Court was final for the purposes of an appeal, the Appellate Court adopted the following test, lifted from the 1903 UK Court of Appeal decision in *Bozson v Altrincham Urban District Council*:[8] does the judgment or order appealed from finally dispose of the rights of the parties?[9] Since the passing of Te Ture Whenua Māori Act 1993, this test was applied in *Shaw – Tauwhare Te Ngare* (although not for the purpose of appeal).[10]

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6 *Hau v Foy & Ors – Te Kaha 20B* (1998) 1 Waiariki Appellate Court MB 94 (1 AP 94).
7 At 101.
8 *Bozson v Altrincham Urban District Council* [1903] 1 KB 547.
9 *In Re Marangairoa A29 and Marangairoa A31 Inc* (1962) 28 Gisborne ACMB 155 (28 APGS 155); *Williams v Williams – Matauri 2F2B* (1991) 3 Taitokerau Appellate MB 20 (3 APWH 20); *Te Kanawa v Martin – Te Kumi A31* (1985) 17 Waikato Maniapoto Appellate MB 38 (17 APWM 38).
10 See also *Shaw – Tauwhao Te Ngare* (2004) 81 Tauranga MB 8 (81 T 8) at 39-40.

[12] Therefore, we must consider whether Judge Harvey's order finally disposed of the rights of the parties.

Discussion

[13] As noted at [3] above, Judge Harvey invited submissions on removal "before any final decision is taken". On its face, this statement indicates that a final order was not made. However, the key question is whether further action of the lower Court is required to dispose of the matter, rather than the way in which an order is drawn up.

[14] For example, in the case of *Williams v Williams*,[11] the Appellate Court found that the lower Court's interim order in that case was a final order. The order determined a piece of land to be for the exclusive use and occupation of the applicant and his invitees. The order was to become final provided that the applicant confirmed in writing within three years that he had erected a dwelling upon the site, if he did not, then the order would automatically lapse.

[15] The Appellate Court found that the order "though drawn in an unusual way even stating that it was interim, was for the purposes of Section 42/53, a final order".[12] This was because the lower Court needed to do nothing more for the order to be perfected, nor was anything required if the applicant failed to build within the prescribed three years (as the order would lapse without Court intervention).

[16] The Court in *Williams v Williams* contrasted the order in that case with the order considered in *Te Kanawa v Martin*,[13] in which the Appellate Court found that the lower Court would have had to make further orders before matters could be finally disposed of. In that case, the order related to costs. The lower Court minute stated:

> I think the bringing of this application was justified and I have no hesitation in awarding costs to the applicant. These are to be fixed by agreement between Counsel but failing agreement, the Court will give further directions if a satisfactory agreement cannot be reached between Counsel.

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11 Above n 9.
12 At 23.
13 *Te Kanawa v Martin*, above n 9.

[17] After looking at the relevant sections that a costs order could be made under, and the relevant Māori Land Court Rules, the Appellate Court noted that:

> The Maori Land Court has only the jurisdiction conferred on it by statute. It is preferable, therefore, in a minute of an order to refer to the statutory provision under which it is made. It is also preferable to include the word order and give sufficient information to enable another Judge or the Registrar if called upon to sign the order to satisfy himself that the order submitted for his signature gives effect to the intention of the Court.
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> In the present case the minute leaves room for doubt as to whether the Court was making an order for costs or expressing an intention to make an order for costs when the amount had been settled.

[18] The Appellate Court also noted that broader considerations motivated the lower Court Judge's choice not to make a clear order at the time of the decision. The Judge recognised the destructive potential of a costs award and was minded to adjourn the decision in order to facilitate the parties' coming together to discuss the quantum, in the hope that relationships might be preserved. Regardless of whether the parties heeded this direction or not, further orders of the Court would then be required before the matter could be finally disposed of.

[19] The case before us is more akin to that of *Te Kanawa v Martin*. In our view, it is unclear whether Judge Harvey was making an order for removal, or expressing an intention to make such an order once it was settled whether the removal should be permanent or not. While not determinative, it is nevertheless relevant that the judgment also did not include a clear "order" section stipulating the orders then issued.

[20] Furthermore, Judge Harvey had in mind the long-term implications of removal for the individual trustees (see [2] of this judgment), motivating him to give the trustees an opportunity to articulate their position on whether their removal should be permanent. Giving the trustees such an opportunity has, in effect, meant the pending of any final decision until that opportunity was exercised. Consequently, regardless of whether the trustees go on to make submissions, and whether any submission for a temporary (rather than permanent) removal is successful, the lower Court still needs to make a further order (stipulating the nature of the removal) before the matter can be finally disposed of.

[21] For these reasons, it is clear to us that the order made on 31 August 2016 was not a final order of the Court. The issuing of any order is pending parties' submissions. The nature of the order, that is, whether removal is permanent or not, is also still unknown because it depends on the content of the submissions made to the Court and the manner in which the Court finally determines the issue.

Dated this 30th day of March 2017.

W W Isaac (Presiding) **CHIEF JUDGE**	C L Fox **DEPUTY CHIEF JUDGE**	P J Savage **JUDGE**