IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150002453
APPEAL 2015/10

UNDER	Section 58, Te Ture Whenua Maori Act 1993
IN THE MATTER OF	Te Kaha 65 Block
BETWEEN	EDWARD MATCHITT Applicant
AND	PARATENE MATCHITT Respondent

Hearing: 11 November 2015
(Heard at Rotorua by teleconference)

Coram: Judge L R Harvey (Presiding)
Judge D J Ambler
Judge S R Clark

Appearances: J P Koning for the Appellant
A M Gallie for the Respondent

Judgment: 23 November 2015

JUDGMENT OF THE COURT

Copies to:

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Introduction

[1] In our decision of 20 August 2015 we granted the appellant leave to appeal out of time the decision of Deputy Chief Judge Fox of 16 September 2014.[1] The appeal was subsequently set down to be heard on 13 November 2015.[2] On 4 November 2015 counsel filed a joint memorandum advising that the parties had agreed to resolve the appeal, and set out orders they asked the Court to make by consent. On 11 November 2015 we convened a teleconference with counsel to discuss their joint memorandum.[3] We then vacated the hearing on 13 November 2015.

[2] This decision therefore addresses whether all or any of the orders proposed by counsel are appropriate to dispose of the appeal.

The joint approach of the parties

[3] Counsel propose that the Court make the following orders by consent:

(a) quashing the occupation order made pursuant to ss 37(3) and 328 of Te Ture Whenua Māori Act 1993 ("the Act") at 104 Waiariki MB 145-151 and dated 16 September 2014 vesting a 1.7300 hectare site on Te Kaha 65 in Paratene Matchitt, Mana Matchitt and Elaine Hutcheson for their exclusive use and occupation;

(b) quashing the decision of Deputy Chief Judge Fox at 104 Waiariki MB 145-151 and dated 16 September 2014 dismissing application A20130008237 and application A20130010961;

(c) directing that application A20130008237 and application A20130010961 be remitted back to the Court for reconsideration;

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1 2015 Māori Appellate Court MB 433 (2015 APPEAL 433)
2 2015 Chief Judge's MB 598 (2015 CJ 598)
3 Counsel took a pragmatic approach to the appeal and agreed to the teleconference operating as the hearing pursuant to r 8.20(1)(d) of the Māori Land Court Rules 2011 ("the 2011 Rules")

(d) directing that application A20130008237 and application A20130010961 be placed before the circuit Judge at Te Kaha for further directions and timetabling orders;

(e) directing that Deputy Chief Judge Fox be excused from hearing or determining application A20130008237 and application A20130010961; and

(f) ordering that costs on this appeal and application A20130008237 and application A20130010961 lie where they fall.

[4] In convening the teleconference on 11 November we were particularly interested in whether we could make all or any of the proposed orders without ruling on the merits of the appeal. In other words, could this Court direct a rehearing without itself concluding that the decision of the Court below was tainted in some way and that a rehearing was required?

[5] Counsel made several points in support of the Court being able to make some (though not all) of the proposed orders.

[6] Mr Koning, for the appellant, pointed out that r 8.19(2) of the 2011 Rules provides that an appeal can be disposed of in this very manner:

> **8.19 When Māori Appellate Court may dismiss appeal without hearing**
>
> …
>
> (2) The Māori Appellate Court may, without a formal hearing, allow the appeal and order that the matter be reheard if—
>
> (a) it is clear on the face of the appeal that the matter should be reheard; and
>
> (b) the parties consent.

[7] In addition, s 56(1)(e) of the Act provides that on an appeal, the Court may do "one or more of the following things" including directing a rehearing by the Māori Land Court "of the whole or any specified part of the matter to which the order relates". Mr Koning

submitted that the Court did not need to rule on the merits of the appeal if it were asked to order a rehearing by consent.

[8] Counsel made several points regarding the problems with the learned Judge's decision in support of the submission that it is "clear on the face of the appeal that the matter should be reheard" per r 8.19(2)(a).

[9] Mr Koning submitted that the main flaw in the decision lay in the Judge invoking s 37(3) of the Act to make the occupation order under s 328 in favour of Paratene Matchitt, Mana Matchitt and Elaine Hutchinson, without giving any prior notice to the parties that she intended taking that approach. Mr Gallie, for the respondent, accepted there was an insurmountable flaw in Judge Fox making the occupation order without being able to satisfy herself in terms of s 329(2)(a) that the owners had "sufficient notice of the application and sufficient opportunity to discuss and consider it", as the prospect of granting an occupation order to those three owners had never been discussed by the wider owners.

[10] In addition to those main points, Mr Koning submitted that the Judge was mistaken in her view that the parties were in dispute in relation to the internal partition boundary and how it related to lots 5 and 6. In addition, as no final sketch plan or valuation evidence had been presented, the parties could address those matters at a rehearing. Further, Mr Koning argued that granting an occupation order to Paratene Matchitt and others, when they seek to use the area for a marae and other communal facilities, did not fit with the purpose of occupation orders, which is for housing. There is also the problem with the occupation order being granted over an area which includes the homestead, in respect of which various owners have a contingent right to succeed to ownership of that dwelling (ownership being currently determined in favour of the late Harata Matchitt).

[11] Both counsel emphasised the common approach the parties were now taking to resolving what has been a long-standing dispute between these siblings over use and occupation of the land. A rehearing will therefore allow them to explore a solution by consensus.

[12] Mr Koning accepted that if the Court were to grant a rehearing without annulling or revoking the orders complained of then the rehearing would be akin to one under s 43 of the Act, where the Court below can decide to affirm or vary or annul its earlier decision and orders. Finally, Mr Koning also accepted that there was no proper basis for this Court to direct that Judge Fox not preside over any rehearing.

Discussion

[13] Rule 8.19(2) enables this Court to allow an appeal and order a rehearing where we conclude "on the face of the appeal" that the proceeding should be reheard, and the parties consent. We are not aware of any decisions of this Court that discuss that provision. Indeed, r 8.19(2) is a new procedure with no equivalent in either the Māori Land Court Rules 1994 or the Māori Land Court Rules 1958.

[14] While we commend the co-operative approach of the parties in attempting to resolve the appeal by agreement, we were concerned that we were in effect being invited to overturn the decision of the Court below without making a ruling to that effect.

[15] We have considered r 8.19(2) in the context of the 2011 Rules and ss 54 to 57 of the Act as they apply to this Court. In our view, where the Court is invited to order a rehearing by consent pursuant to r 8.19(2), it is still necessary for the Court to satisfy itself that the appeal has merit, that is, that there is an error that taints the decision under appeal in some respect. That is the logical consequence of the wording in the rule, which provides that the Court may "allow the appeal" if "it is clear on the face of the appeal that the matter should be reheard". In order for the Court to "allow the appeal", it must surely overturn the decision; and in order for the Court to determine that the matter "should be reheard", it must first conclude that there is merit in the appeal.

[16] There is a more fundamental reason why this Court must reach its own conclusion on the merits of the appeal when invited to adopt the r 8.19(2) procedure. An appeal challenges the decision of a lower Court. The integrity of our system of justice requires that an appellate court not intervene in lower Court decisions without proper grounds. Simply rubberstamping the parties' agreement that there should be a rehearing, without going on to assess the merits of appeal, runs the risk of unreasoned appellate decisions and exposing the appeal process to potential abuse.

[17] The comments of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* highlight this point: [4]

> … the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

[18] We therefore conclude that we do need to assess the merits of the appeal, that is, to determine if it is clear on the face of the appeal that the matter should be reheard. Having reviewed the case on appeal and the submissions of counsel, we are satisfied that the appeal should be allowed and that the proceedings should be reheard.

[19] We consider that the occupation order granted to Paratene Matchitt and others is unsafe. Judge Fox invoked s 37(3) of the Act to make the occupation order without giving any prior notice to the parties that she intended taking that step. Longstanding principles of natural justice require that notice is to be given to the affected parties.[5] Given that the owners had not considered that occupation order option, the Judge was not able to satisfy herself of the mandatory consideration in s 329(2)(a) of the Act that the owners had sufficient notice of the proposal and sufficient opportunity to discuss and consider it.

[20] We are also satisfied that the decision to dismiss the partition application was informed by an erroneous assumption that there was a dispute over the internal boundaries of the proposed partition. A rehearing is required to clarify that matter. However, we express no other view on the reasons for dismissing the partition proposal. It may well be that having clarified the internal boundary issue, the Judge who eventually hears the application will still conclude that the grounds have not been made out to grant the partition. That is for that Judge to consider.

[21] A further factor in our decision to order a rehearing is that the appeal process appears to have forced the parties to reflect on the options for long-term solutions for their land. Although we are conscious that the parties have pursued options on more than one occasion in the past, it does seem that with the assistance of counsel, they may be able to find a durable and lasting solution through a rehearing process.

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4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 at [4]. See further comments of the Supreme Court at [3] – [5], and in *Kacem v Bashir* [2010] NZSC 112 at [31] – [33].

5 *Maxwell v Parata – Maruata 2B2* (1994) 4 Taitokerau Appellate MB 18 (4 APWH 18).

[22] Accordingly, we conclude that it is appropriate to allow the appeal and direct a rehearing. We will grant the orders sought at [3](a) to (d) and [3](f) above. There is no basis to direct that Judge Fox not preside over the rehearing. No grounds were advanced at the hearing and, in any event, recusal is for the Judge concerned to consider in the first instance, not an appellate court.[6]

Result

[23] In reliance upon r 8.19(2) of the 2011 Rules we allow the appeal and make the following orders pursuant to the Act:

(a) Section 56(1)(b) revoking the orders of the Court dated 16 September 2014 dismissing the application for partition, dismissing the application for amendment to the occupation orders, and granting an occupation order in favour of Paratene Matchitt, Mana Matchitt and Elaine Hutchinson; and

(b) Section 56(1)(e) directing a rehearing by the Māori Land Court of both applications.

[24] There is no order as to costs.

This judgment is endorsed pursuant to r 8.20(3) of the Māori Land Court Rules 2011.

L R Harvey (Presiding)	D J Ambler	S R Clark
JUDGE	**JUDGE**	**JUDGE**

[6] *Wall v The Māori Land Court – Tauhara Middle 15 Trust and Tauhara Middle 4A2A Trust* [2010] Māori Appellate Court MB 55 (2010 APPEAL 55) at [122].