IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA106/2022
[2023] NZCA 338

BETWEEN	WI HUATA AND DONNA HUATA Appellants
AND	MANGAROA 26N2 TRUST Respondent

Hearing: 28 July 2023 (via teleconference)

Counsel: C F J Reid for Appellants
L A Foley for Respondent

Judgment: 31 July 2023 at 4 pm

JUDGMENT OF FRENCH J
[Re: application for stay]

A The appellants' application for a stay is declined.

B Costs on the application are reserved for consideration at the substantive hearing on 10 August 2023.

REASONS

Introduction

[1] At the conclusion of an oral hearing held by way of a telephone conference call on 28 July 2023, I advised counsel that I had decided the appellants' application for a stay should be declined with costs reserved for consideration at the substantive hearing of the appeal. I also advised that I would provide reasons for my decision in writing. Those reasons now follow.

Background

[2] The substantive appeal in this case was filed on 8 March 2022. It is an appeal against a High Court decision regarding general land leased by the appellants from the respondent an Ahu Whenua Trust constituted under the Māori Affairs Act 1953.[1] The land had been purchased by a Mrs Te Whare in 1909 and in 1974 the respondent was established to administer the land on behalf of her descendants.

[3] In the decision under appeal, the High Court granted the respondent a declaration that the appellants' lease had expired in September 2019 and also granted the respondent an order for possession of the land.[2] In making those orders the Judge rejected the appellants' defence that they had an enforceable option to purchase the land under an agreement to lease executed in 1999.[3]

[4] A case on appeal was duly filed in this Court and on 10 August 2022 a fixture date of 5 July 2023 was allocated. The appellants' submissions were required to be filed by 30 May 2023.

[5] On 5 May 2023, the then counsel for the appellants, Ms Monteiro, sought leave to withdraw as counsel due to non-payment of fees. Leave was granted. Subsequently, in emails dated 17 and 18 May 2023, Mr Huata requested an adjournment of the hearing until September 2023.

[6] In a direction dated 22 May 2023, Goddard J adjourned the hearing to 10 August 2023. His direction went on to say:

> It would be contrary to the interests of justice for there to be any further delays in resolving this appeal. There will be no further adjournments, or extension[s] of time for filing documents, in the absence of truly exceptional circumstances wholly outside the control of the party seeking an adjournment or extension of time.

[7] The appellants were required to file submissions on or before 13 July 2023.

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1 *Mangaroa 26N2 Trust v Wi Huata* [2021] NZHC 113.
2 At [192].
3 At [174] and [191].

[8] The submissions were not filed by that date. Instead, the appellants' new counsel Mr Reid filed an application for a stay of proceedings, together with a supporting affidavit from Mr Huata providing an outline of the tikanga claim he wants the High Court to determine.

[9] The application, which was brought under pt 2A and r 48(2) and (4) of the Court of Appeal (Civil) Rules 2005, sought orders:

(a) staying this proceeding pending the High Court's determination of the appellants' claim under tikanga;

(b) remitting the tikanga claim to the High Court for determination; and

(c) costs in the event the respondent opposed the orders sought.

[10] It is common ground that a tikanga claim was never pleaded by the appellants in the High Court.

[11] Tikanga was mentioned in the High Court decision in reference to an assertion that had been made by Mr Huata in cross-examination.[4] It was made during questioning about a building consent application form which showed him as the owner of the land and which he said had been completed by his brother. An agreed statement of facts included the statement that the land was general land, not Māori land. When it was put to him that his brother would have known he was not the owner, Mr Huata replied by asserting that when talking about ownership of the land "we are talking in terms of us, this being a whenua Māori title".

[12] Mr Huata went on to claim whakapapa to the whenua pre-dating Mrs Te Whare. He acknowledged that he had never made this assertion before in any discussions with the respondent, nor in the Māori Land Court in proceedings between the parties in 2014 and in 2019.

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4 At [186]–[189].

[13] In the High Court judgment under appeal, Grice J referred to this assertion of mana whenua.[5] She noted the passion Mr Huata expressed for his relationship with the land but held that such a claim based on tikanga Māori would need to be properly made and argued.[6] It had not been and therefore it was not able to be considered in these proceedings.[7]

[14] When the appeal against the High Court decision was filed in this Court in March 2022, the grounds of appeal did not include any reference to tikanga. They had been filed by Mr O'Connor who had acted for the appellants in the High Court. The appellants had previously been represented by Mr La Hatte.

[15] In May 2022, the appellants changed lawyers again. In June 2022, their then counsel, Ms Monteiro, sought a fixture and in a memorandum identifying the issues, she included an issue as to whether the Judge was wrong to hold that a claim based on tikanga could not be considered and to determine the case without hearing full argument on that claim. The respondent objected to the inclusion of that issue, contending that it was not part of the appeal.

[16] On 29 June 2022, Ms Monteiro filed amended grounds of appeal. These did not include any reference to the Judge's treatment of Mr Huata's assertion of mana whenua.

[17] As already mentioned in August 2022, a fixture of 5 July 2023 was allocated. And then in May 2023, at the request of the appellants, the hearing was adjourned until 10 August 2023 with submissions due on 13 July. This Court gave a strongly worded direction that there were to be no further delays.

[18] After being served with the application for a stay, the respondent filed a memorandum opposing it. In the memorandum, counsel, Ms Foley, pointed out that the tikanga claim outlined by Mr Huata in his affidavit appeared to have a different focus to the assertion he made at trial. The claim in the affidavit appeared to be a claim that there was an agreement, which although held to be unenforceable at general

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5 At [186].
6 At [187]–[188].
7 At [187].

law in the High Court, would be enforceable under tikanga principles. That was not the claim that Grice J is criticised for failing to investigate. Further, the claim raised in the affidavit was, in Ms Foley's submission, not only new but also untenable having regard to the provisions of the respondent's trust deed.

[19] On 25 July 2023, I convened a conference call for the purpose of giving Mr Reid an opportunity to respond to the matters raised in the respondent's memorandum. Contrary to a suggestion made by Ms Foley, I considered that given the nature of the application it needed to be determined before the fixture date rather than at the August hearing itself. A further conference call was then convened for 28 July 2023 for oral argument. Timetabling directions regarding filing of submissions pertaining to the substantive appeal, in the event the application did not succeed, were also made.

[20] Immediately prior to the conference call on 28 July 2023 both counsel filed further submissions regarding the stay application.

Analysis

[21] In support of the application, Mr Reid said the starting point was that these were Māori parties in dispute. He relied on the Supreme Court decision in *Ellis*[8] and made the following principal submissions:

(a) until the High Court has determined the tikanga claim it is premature for the appeal to be heard;

(b) the failure of the appellants to raise the tikanga claim earlier was due to errors on the part of their previous lawyers;

(c) those errors were then compounded by the High Court Judge who (without the benefit of the *Ellis* decision) failed to adjourn the hearing and call for further evidence;

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[8] *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.

(d) although initially rejecting the suggestion that the tikanga claim now being advanced was different to the assertion of mana whenua made in the High Court, Mr Reid acknowledged the claim currently lacked specificity and needed to be properly pleaded and articulated. That was however something that required specialist assistance which he was not able to provide;

(e) the purpose of the stay application was to give the appellants an opportunity to correct what had gone wrong and so avoid a miscarriage of justice; and

(f) the respondent would not be prejudiced by a stay because the appellants are now up to date with rent payments and all rental payments during the continuation of the stay would be paid in advance. In the event the tikanga claim was successful it would constitute an alternative basis for determining the respondent's applications and it is anticipated the appeal would then be withdrawn.

[22] I did not accept these submissions. In my view, it would be unjust for there to be any further delay in the prosecution of this appeal. For the appellants to attempt to stay their own appeal at the eleventh hour by invoking a new and vague claim that was never before the High Court is unacceptable. If, as seems surprising, there were errors made by no fewer than three sets of lawyers, that is a matter between the appellants and those lawyers. It is, in my view, untenable to suggest that the respondent would not be significantly prejudiced by what would be a very significant delay. All of this comes against a history of delays occasioned by the appellants, including an attempt in the High Court to stay that proceeding over a year after the respondent had filed its originating application for possession of the land.

[23] I therefore declined the application for a stay. As regards costs, given that counsel had not addressed these, I decided the fairest course of action was to reserve these for consideration at the substantive hearing.

Outcome

[24] The appellants' application for a stay is declined.

[25] Costs on the application are reserved for consideration at the substantive hearing on 10 August 2023.

Solicitors:
Langley Twigg, Napier for Appellants
Le Pine & Co, Taupō for Respondent