

IN THE DISTRICT COURT
AT THAMES

CIV-2010-075-000176

BETWEEN THAMES-COROMANDEL DISTRICT
COUNCIL
Plaintiff

AND FRANCES HENARE, BRIAN HENARE,
CHARLES HENARE, DEAN HENARE,
FAHLEN HENARE, RAYMOND
WIKAIRA, DAVID SWINTON, DANIEL
BENSON
First Defendants

AND FRANCES HENARE AS THE
REPRESENTATIVE OF PERSONS
UNKNOWN OCCUPYING PAPA
AROHA BEACH ACCESS ROAD

Hearing: 18 October 2010

Appearances: MC Frogley for the Plaintiff
D Benson for the Defendants

Judgment: 20 October 2010 at 1.30 pm

RESERVED JUDGMENT OF JUDGE P R SPILLER
[Regarding Removal from Land]

[1] In this case the plaintiff has applied for the following orders against the defendants:

- a) An order granting to the plaintiff immediate possession of the Papa Aroha Beach Access Road, being all of the Papa Aroha Beach Access Road defined in the Dunwoodie & Green Surveyors Limited Site Plan 5945 Sheet 1 dated September 2010 (“the Road”).

- b) An injunction restraining the defendants from proceeding with building work on the Road.
- c) An injunction requiring the defendants to demolish and remove all structures which they have erected on the Road.
- d) An injunction requiring the defendants to vacate the Road immediately, taking with them all of their personal property including motor vehicles.
- e) An order that, if the defendants fail to comply with the orders within 24 hours of service of the orders on Frances Henare, the plaintiff is entitled by its servants or agents to remove all property and structures not removed by the defendants and that such property is to be the subject of an inventory and be taken to a depot or place to be available for collection on proof of ownership by the defendants without charge, and if not collected within seven (7) days, may be disposed of by the plaintiff.
- f) An order that the defendants pay the plaintiff's costs of, and incidental to, this application.

Material facts

[2] The plaintiff is a local authority constituted under the Local Government Act 2002, having its principal office at 515 Mackay Street, Thames ("the Council"). The defendants are members of the Ngati Rongo-U and their supporters.

[3] Since July 2010 the defendants, without the permission of the Council, have occupied and taken possession of the Papa Aroha Beach Access Road ("the Road"). The defendants say that their whanau are in occupation of their ancestral land known as Papa Aroha and they have moved back to Papa Aroha Marae. The defendants have erected a number of structures on the Road including tents, caravans and cooking facilities. They have set up camp on the Road and have slept overnight in the structures. During a recent storm the defendants' structures blew down causing

damage to the adjacent holiday park. The defendants have begun building a more substantial structure on the road. According to one defendant, it is a meeting house.

[4] The defendants have placed barricades across the road to assert control over the Road and to exclude others. They have placed rocks and a piece of driftwood across the Road. They have placed signs across the Road which read “Trespassers will be Prosecuted”. One sign says “Private Property, No Access, Keep Out”. Other signs say “Customary Land” and “Wahi Tapu”. Members of the public have been denied access to the beachfront and adjacent stream and denied access to the DOC reserve by the occupiers. But the defendants say that members of the public who have asked politely have not been denied access.

[5] On 24 September 2010 the Council served a trespass notice and a letter on the defendants. The letter asked the defendants to cease camping on the Road and leave the Road by 27 September 2010. It is accepted that the defendants have received oral and written requests to leave but have refused to leave the Road.

The Defendants’ Arguments

[6] The defendants’ primary argument is that they hold customary rights to the land on which the Road is situated. The defendants rely on the Court of Appeal case of *Attorney General v Ngati Apa* [2003] 3 NZLR 643 (the foreshore and seabed case). The defendants’ argument is that “native title” remained in New Zealand following the Treaty of Waitangi. The defendants argue that legislation such as the Building Act and Council by-laws do not apply to Maori customary land. The defendants argue that an Order in Council made by Governor Grey on 28 June 1865, creating the Native District of Hauraki under the Native Districts Regulations Act 1858, remains in force. (The Native Districts Regulation Act 1858 created Districts within which the Governor General could make regulations specific to areas where native title had not been extinguished.)

[7] The defendants further argue that the land in question has no current title under the Land Transfer Act 1952 and that the Council has not proved that it has title in the land in question. The defendants argue that there is no proof that their

buildings are on what the plaintiff claims is a road subject to its ownership. They refer in this regard to the judgment of Randerson J in *Benson v Police*, unreported, High Court Hamilton, CRI-2003-415-35, 16 February 2004. This case involved a charge of trespass laid under the Trespass Act 1980, section 3(1). The conviction in the District Court was set aside because of the unsatisfactory nature of the documentary evidence in support of the Council's ownership of the land in question.

Discussion

Plaintiff's title to the Road?

[8] The Papa Aroha Beach Access Road was established by New Gazette 1918 p3875 which was registered as Proclamation 4576. This Proclamation was registered against Certificate of Title 263/39 on 23 January 1919. The land for the Road was taken for a public work under section 19 of the Public Works Act 1908 from Maori-owned Papa Aroha 1C Block. The Plan supporting the Proclamation, PWD 42995, was given Survey office Plan number 17427. The survey plan notes that the land was taken under section 389 of the Native Land Act 1909. The defendants do not dispute the Gazette notice, the Proclamation, the correctness of the survey plan for the purposes of the Gazette, or that the survey plan notes that the land was taken under section 389 of the Native Land Act 1909.

[9] By section 19 of the Public Works Act 1908, the land became absolutely vested in fee simple in the Crown, discharged from all claims, estates, or interests of what kind soever, for the purposes of a road. By section 389 of the Native Land Act 1909, no compensation was payable and the road vested in the Crown free from any right, title, estate or interest in any other person.

[10] The fee simple of the Papa Aroha Beach Access Road, along with other roads, became vested in the Thames-Coromandel District Council by section 316(1) of the Local Government Act 1974. Road is defined in section 315(1) of this Act to include land within a district which is vested in the council for the purpose of a road as shown on a deposited survey plan. By section 317 all roads in the district are under the control of the Council. I am therefore satisfied that the Road in question is currently vested in the Thames-Coromandel District Council.

Defendants' occupation of the Road?

[11] Mr Philip Green, a registered surveyor, was engaged by the Council to prepare a site plan of the Papa Aroha Beach Access Road, recording any structures which had been built on the road. The site plan confirms that the defendants' building near the beach front and a caravan with constructed annex (near the telephone box) are both located within the boundaries of the Road.

[12] I have carefully considered the site plan of the Papa Aroha Beach Access Road prepared by Mr Green. In the absence of satisfactory evidence to the contrary, I find that the defendants are in occupation of the plaintiff's Road.

Jurisdiction of the Court to make an order for possession?

[13] As noted in paragraph [1] above, the plaintiff applies for an order granting to the plaintiff immediate possession of the Papa Aroha Beach Access Road. Section 240 of the Public Works Act 1981 provides:

Recovery of land from persons holding illegal possession

- (1) Where any person is in occupation of any land held for, or to be taken, purchased, or acquired for, any public work, without any right, title, or licence, or whose right, title, or licence has expired or been forfeited, cancelled or extinguished, the Minister of Lands, or the local authority, in the case of a local work, or any person appointed in writing by any of them, may commence proceedings in the District Court nearest to the place where the land is situated to recover possession of the land and damages for use and occupation; and in any such case the jurisdiction of that Court shall not be ousted on the plea that a question of title is involved, or that the value of the premises possession of which is sought to be recovered is above the jurisdiction of the Court.
- (2) If on the hearing of any such action, -
 - (a) The defendant does not appear: or
 - (b) It is shown to the satisfaction of the Court that the title under which the defendant claims has, as between himself and the Crown or the local authority, as the case may be, expired or become liable to forfeiture or cancellation –

the Court shall declare such title to be extinguished, and may order that possession of the land be given by the defendant to the plaintiff, either forthwith or on or before such day as the Court

thinks fit to name; and that the defendant pay damages for use and occupation and the costs of the action.

- (3) If delivery of the land is not made pursuant to such order the Court may issue a warrant authorising and requiring the bailiff of the Court or any constable to give possession of the land to the plaintiff.
- (4) The provisions of sections 99, 100 and 101 of the District Courts Act 1947 shall, so far as they are not repugnant to or inconsistent with this section, apply to any proceedings taken under this section.

[14] The defendants have indicated that they will not vacate the road even if the Court grants an order for possession. I therefore find that this Court has jurisdiction to issue a warrant under section 240(3) of the above Act authorising and requiring the bailiff of the Court or any police constable to give possession of the land to the plaintiff. The warrant is issued under section 99(1) of the District Courts Act 1947.

Jurisdiction of the Court to order injunctions and for failure to comply?

[15] As noted in paragraph [1] above, the plaintiff applies for orders granting to the plaintiff injunctions restraining the defendants from proceeding with building work on the Road, requiring the defendants to demolish and remove all structures which they have erected on the Road, and requiring the defendants to vacate the Road immediately, taking with them all of their personal property including motor vehicles. The plaintiff also applies for an order that, in the event of the defendants' failure to comply with the above orders, the plaintiff is entitled to remove all property and structures not removed and, if these are not collected by the defendants, may dispose of this property.

- The Building Act 2004

[16] It is an offence under s 40 of the Building Act 2004 to carry out any building work except in accordance with a building consent. This Act is of general application and it applies even to Maori land. See *Taiwhanga v Thames-Coromandel District Council*, unreported, High Court Hamilton, CRI 2005-075-1321, 17 August 2006, Rodney Hansen J, confirmed by the Court of Appeal in *Gibbs v New Plymouth District Council* [2010] NZCA 108.

[17] Under s 381 of the Building Act, the District Court may grant an injunction if a person is committing or about to commit an offence against s 40. Under s 382(1), the injunction order may be made restraining the persons concerned from engaging in building work without building consent and ensuring that the person does not engage in that conduct. By s 382(2), the order may be made on such terms that the District Court considers appropriate.

[18] I therefore find that this Court has jurisdiction to issue an injunction restraining the defendants from proceeding with building work on the Road.

- The Common Law of Trespass

[19] The common law of trespass is set out in S Todd (editor), *The Law of Torts in New Zealand* 5th Edition. At paragraph 9.2.07 (5) the author states:

The prima facie rule is that a landowner, whose title is not in issue, is entitled to an injunction to restrain trespass on his land whether or not the trespass harms him. The injunction may be prohibitory (i.e. to prevent continuance or threatened repetition of a trespass), or mandatory (i.e. to remove a trespassing object from the plaintiff's land).

[20] The plaintiff has met with the defendants on several occasions. The defendants have been given oral and written warnings to leave by the occupier and they have refused to do so. The defendants have obstructed and impeded access by the public to the Road.

[21] I find that this Court has jurisdiction in trespass to grant to the plaintiff injunctions restraining the defendants from proceeding with building work on the Road, and requiring the defendants to demolish and remove all structures which they have erected on the Road.

- The Local Government Act 2002

[22] Under s 162(1) of the Local Government Act 2002, the District Court may grant an injunction restraining a person from committing a breach of a by-law or an offence against the Act.

[23] The occupation of the Road by the defendants can be seen to be in breach of the following clauses of the Thames-Coromandel District Council Consolidated Bylaw 2004:

- a) Clause 203.4 (b) of Part 2 Activities in Public Places 2004 which prohibits camping in a public place in an area not set aside for the purpose.
- b) Clause 204 (a) of Part 2 Activities in Public Places 2004 which provides that no person shall obstruct the entrances to or exits from a public place.
- c) Clause 206.1(a) of Part 2 Activities in Public Places 2004 which provides that a person shall not place or leave or cause or permit to be placed or left any material or thing, including signage, on any public place.
- d) Clause 208(a) of Part 2 Activities in Public Places 2004 which provides that a person shall not, without prior consent of an authorised officer, participate in any assembly or associate with other persons in a public place in such a way as to impede pedestrian or vehicular traffic.
- e) Clause 2003.5 of Part 20 of the Consolidated Bylaw which prohibits camping outside an approved camping area without the prior consent of the Council.

[24] Under s 164 of the Local Government Act 2002, an enforcement officer may seize and impound property that has been materially involved in the commission of an offence. Under s 167, the owner of the seized property may request that it be returned. Under s 168, a local authority may dispose of the property that has not been returned within 6 months.

[25] I find that this Court has jurisdiction under the Local Government Act 2002 to require the defendants to demolish and remove all structures which they have erected on the Road, and requiring the defendants to vacate the Road immediately, taking

with them all of their personal property including motor vehicles. I find that this Court also has jurisdiction to order that, in the event of the defendants' failure to comply with the above orders, the plaintiff is entitled to remove all property and structures not removed and, if these are not collected by the defendants, may dispose of this property.

Consideration of the Defendants' Arguments

[26] As noted in paragraph [6] above, the defendants' primary argument is that they hold customary rights to the land on which the Road is situated. However, this argument fails because (as noted in paragraph [8]), the original Maori owners converted their customary rights to the entire Papa Aroha 1C block to a Crown-granted fee simple title. The block was therefore brought under the Land Transfer Act in 1916. The Crown granted a fee simple title to four owners "subject to any existing right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly of New Zealand". A case analogous to the present case is *Brown v Attorney-General*, unreported, High Court Whangarei, CIV 2005-488-612, 28 October 2005. The reference by the defendants to the Court of Appeal case of *Attorney General v Ngati Apa* [2003] 3 NZLR 643 overlooks the ability of the Crown to extinguish native title through legislation (at paragraphs [47] and [148]). Any pre-existing customary rights in the present case were extinguished by the clear and plain words of the Public Works Act 1908 and the Native Land Act 1909. See also *R v Tame Iti* [2007] NZCA 119.

[27] Section 129(2)(c) of Te Ture Whenua Maori Act 1993 states that land (other than Maori Freehold Land and General Land owned by Maori) that has been alienated from the Crown for a subsisting estate in fee simple has the status of General Land. The Road in the present case has been vested in the Council and as such has been alienated from the Crown for a subsisting estate in fee simple. The road is thus classified as General Land under Te Ture Whenua Maori Act. By section 129(3), the land continues to have that particular status unless changed in accordance with the Te Ture Whenua Maori Act. Therefore, before the defendants can assert that the land has the status of Maori customary land, such a status would

have to be changed by the Maori Land Court under section 131 of the Act. The land has not been classified by the Maori Land Court as having a customary status.

[28] The defendants' additional argument concerning Maori customary rights, that legislation such as the Building Act and Council by-laws do not apply to Maori customary land, can also not be upheld in this case. The Road has the status of General Land and the Building Act and by-laws apply in any event. The defendants' argument as to the applicability of an Order in Council made under the Native Districts Regulations Act 1858, cannot be upheld because this Act was repealed by the Repeals Act 1891.

[29] As noted in paragraph [7] above, the defendants further argue that the land in question has no current title under the Land Transfer Act and that the Council has not proved that it has title in the land in question. However I have found (in paragraphs [8-10] above) that ownership of the land in question does vest in the Council. The defendants argue that there is no proof that their buildings are on what the plaintiff claims is a road subject to its ownership. However I have found (in paragraphs [11-12] above) that it has been established that the defendants are in occupation of the plaintiff's land. I further find that the judgment of Randerson J in *Benson v Police*, cited above, does not support the defendants' argument in the present case. Randerson J expressly stated that he did not find it necessary to address the appellant's argument as to customary title and the jurisdiction of the District Court. The conviction was overturned due to lack of proof on facts which are distinguishable from the present case. The judgment does not give the defendants any authority or licence to occupy the Road in question in the present case.

Conclusion

[30] I understand and respect the position of the defendants. Their stance is based on deep and sincere beliefs founded in their culture and history. However their position cannot be justified in terms of the law which prevails in New Zealand. I must therefore find in favour of the plaintiff.

[31] I make the following orders against the defendants:

- a) An order granting to the plaintiff immediate possession of the Papa Aroha Beach Access Road, being all of the Papa Aroha Beach Access Road defined in the Dunwoodie & Green Surveyors Limited Site Plan 5945 Sheet 1 dated September 2010 (“the Road”).
- b) An injunction restraining the defendants from proceeding with building work on the Road.
- c) An injunction requiring the defendants to demolish and remove all structures which they have erected on the Road.
- d) An injunction requiring the defendants to vacate the Road immediately, taking with them all of their personal property including motor vehicles.
- e) An order that, if the defendants fail to comply with the orders within 24 hours of service of the orders on Frances Henare, the plaintiff is entitled by its servants or agents to remove all property and structures not removed by the defendants and that such property is to be the subject of an inventory and be taken to a depot or place to be available for collection on proof of ownership by the defendants without charge, and if not collected within seven (7) days, may be disposed of by the plaintiff.

[32] I further order that the costs of and incidental to this application are reserved.



P R Spiller

District Court Judge