

**IN THE MĀORI LAND COURT OF NEW ZEALAND
TAITOKERAU DISTRICT**

A20150002480

UNDER Sections 37(3), 86, 71, 73, 18(1)(a) and 19(1)(a),
Te Ture Whenua Maori Act 1993

IN THE MATTER OF Motatau 3B2B3

BETWEEN TRUSTEES OF AATA PAORA KERETENE
AHU WHENUA TRUST
Applicant

AND PARATA CHERRINGTON
EMERI CHERRINGTON
Respondents

Hearing: 23 April 2015
3 July 2015
16 September 2015
(Heard at Whangarei)

Appearances: Mr Wayne Coutts, for the applicant
Ms Katherine Taurau, for the respondents

Judgment: 27 January 2016

RESERVED JUDGMENT OF JUDGE M P ARMSTRONG

Introduction

[1] On 23 April 2015, I granted an interim injunction preventing Parata Cherrington from entering or residing upon the Motatau 3B2B3 block (“the block”).¹ The background to this proceeding is set out in my oral judgment which granted the interim injunction and there is no need to repeat it here.

[2] The interim injunction was sought pending the determination of the application to vary the s 18(1)(a) order granted by Judge Harvey on 29 September 2005 at 37 Kaikohe MB 163-176 (“the 2005 order”) and additionally whether a permanent injunction should be granted.

[3] Following the grant of the interim injunction, a further hearing was held on 3 July 2015.² Mr Coutts appeared for the applicants seeking to amend the 2005 order by recording that the order was conditional on alternative proceedings being brought against Mr Cherrington. Mr Coutts also sought the cancellation of the visitation rights provided for in the 2005 order, and a permanent injunction against Mr Cherrington. Finally, Mr Coutts sought a further amendment to the 2005 order so that Emeri Cherrington’s right of occupation of the homestead on the block would be non-exclusive. Neither Emeri nor Parata Cherrington appeared at the hearing. At the conclusion of the hearing, I directed Mr Coutts to file and serve further submissions regarding the terms of the orders sought.

[4] Mr Coutts subsequently filed and served those submissions. In response, Mrs Cherrington instructed counsel, Ms Taurau, and filed an affidavit and submissions opposing the orders sought.

[5] Given the issues raised on behalf of Mrs Cherrington, I set the application down for further hearing which was held on 16 September 2015.³ During the course of that hearing, agreement was reached as to the occupation of the homestead by Mrs Cherrington. As a result, the application to vary Mrs Cherrington’s right of occupation was withdrawn.

¹ *Trustees of Aata Paora Keretene Trust v Cherrington – Motatau 3B2B3* (2015) 102 Taitokerau MB 43 (102 TTK 43).

² 108 Taitokerau MB 294 (108 TTK 294).

³ 116 Taitokerau MB 169 (116 TTK 169).

[6] I subsequently adjourned the outstanding matters to Chambers for a reserved decision to issue.

Issues

[7] The remaining issues for determination are:

- (a) Whether the 2005 order should be amended to record that the order was conditional on alternative proceedings being brought against Mr Cherrington;
- (b) Whether Mr Cherrington's visitation rights pursuant to the 2005 order should be cancelled; and
- (c) Whether a permanent injunction should be granted preventing Mr Cherrington from entering upon the block.

Should the 2005 order be amended per s 86 of Te Ture Whenua Maori Act 1993?

[8] Section 86 of Te Ture Whenua Māori Act 1993 ("the Act") states:

86 Amendment of orders, warrants, etc

- (1) The Court or any Judge of the Court may at any time make or authorise to be made in any order, warrant, record, or other document made, issued, or kept by the Court all such amendments as are considered necessary to give effect to the true intention of any decision or determination of the Court, or to record the actual course and nature of any proceedings in the Court.
- (2) Every such amendment shall take effect as of the date of commencement of the order, warrant, record, or other document so amended.
- (3) Without limiting the foregoing provisions of this section, the Court may at any time during any proceedings direct the Registrar to make any amendment of any entry in the records of the Court that the Registrar is authorised to make under section 87 of this Act.

[9] Section 86 of the Act provides the Court with the jurisdiction to correct slips, or to vary its own orders to give effect to the true meaning and intention of the judgment. What is to be corrected must be the result of a slip or a failure to express what was decided and

intended. This provision cannot be applied as a ‘carte blanche’ power to vary an order in a fundamental way.⁴

[10] In the present case, it is clear that Judge Harvey intended to grant an order to give effect to an interim arrangement agreed to between the parties. The Court minute records:⁵

Court: Mrs Cherrington and Mrs Maaka have had a discussion and I think we’ve reached an interim arrangement pending further discussion amongst the family and pending the outcome of any further proceedings that may or may not be brought in another Court.

...

So, I stress this is simply a temporary arrangement, in one respect, so that these matters can move forward and that the family can look forward to the unveiling and not behind.

...

So, it’s agreed that Mrs Cherrington’s application for ownership of the house be dismissed. I dismiss that application accordingly.

It’s further agreed that Mrs Cherrington have right of occupation of the home for her lifetime. There is an order pursuant to section 18(1)(a) confirming Mrs Cherrington has the right to live in the home for the rest of her life.

It’s further agreed that Mrs Cherrington’s son should not live at the house but is free to visit his mother from time to time. When the family plan to visit, they are to give Mrs Cherrington 48 hours notice so that, if Mr Cherrington is present, he needs to vacate. This is pending the outcome of any proceedings brought against him in any other Court.

[11] The 2005 order was then drawn and sealed to give effect to this decision. The operative section of the 2005 order states:

NOW THEREFORE IT IS HEREBY ORDERED pursuant to the provisions of Section 18(1)(a) of Te Ture Whenua Maori Act 1993 that Emeri Cherrington has the right to live in the home for the rest of her life with the following conditions:

Parata Cherrington shall not live at the house but is free to visit from time to time.

When the family plan to visit they shall give Emeri Cherrington at least 48 hours notice to allow Parata Cherrington (should he be present) time to vacate.

⁴ See *Wilcox v Teat* HC Rotorua, CIV 2008-463-784, 15 March 2011 where the High Court applied Rule 11.10 of the High Court Rules which similarly provides for the correction of accidental slips or omissions.

⁵ 37 Kaikohe MB 163-176 (37 KH 163-176).

[12] It is evident in the minutes that the order was in the nature of an interim order, and that it was pending the outcome of other proceedings against Mr Cherrington. However, this is not clearly reflected in the order itself.

[13] Mr Coutts argues that the failure to note the interim nature of the order, and that the order was pending the outcome of other proceedings against Mr Cherrington, is a slip or omission which should be corrected per s 86 of the Act.

[14] In oral submissions Ms Taurau advised:⁶

K Taurau ...I accept that what is recorded in the minutes that there was a temporary order pending those proceedings, but – and I think I said it at the outset, the next step to say that the order can be amended, an order that a permanent injunction should be appropriately made, one does not follow the other....

[15] I am satisfied that the 2005 order was intended to give effect to an interim arrangement agreed between the parties. Judge Harvey stressed this when delivering his decision as recorded in the minute. While that is clearly recorded in the minute, it was not recorded in the order which was subsequently drawn and sealed.

[16] I am also satisfied that the failure to record the interim nature of the order, and that it was pending the outcome of other proceedings against Mr Cherrington, was a slip or omission. This should have been included as a further condition in the body of the order.

[17] As such, the 2005 order should be amended per s 86 of the Act to give effect to the true intention of Judge Harvey's decision.

Should the 2005 order be further amended to cancel Parata Cherrington's visitation rights?

[18] In determining this issue I must first consider whether it is appropriate to review the terms of the 2005 order. If it is, I must then consider whether Mr Cherrington's visitation rights granted in that order should be cancelled.

⁶ 116 Taitokerau MB 169-186 (116 TTK 169-186) at 181.

[19] As noted, the 2005 order gave effect to a temporary arrangement pending the outcome of alternative proceedings against Mr Cherrington. Those alternative proceedings relate to criminal charges that were subsequently brought against Mr Cherrington.

[20] Mr Benefield gave evidence that at the time of the hearing before Judge Harvey in 2005, Mr Cherrington had not been charged with that offending. However, the allegations against Mr Cherrington were brought to Judge Harvey's attention. Mr Benefield advised that this is what Judge Harvey was referring to in his decision. This was accepted by Ms Taurau on behalf of her client.⁷

[21] Given Judge Harvey's clear expression that the 2005 order was "pending" the determination of those charges, and the fact that those charges have now been prosecuted, it is appropriate to review the 2005 order.

[22] In reviewing the order, and determining whether to cancel Mr Cherrington's visitation rights, I consider that the following matters are significant.

[23] Firstly, Mr Cherrington was convicted of the offending which had been referred to during the 2005 hearing. Those convictions were for serious sexual offences. At the time of the 2005 hearing only allegations had been made. The fact of the offending is now beyond question.

[24] Secondly, it is also significant that the offending itself was against a member of Mr Cherrington's family, who is a descendant of a beneficial owner in the block. I also take into account that the offending itself occurred on this block.

[25] In addition, I have heard evidence from beneficial owners and their family who have expressed concern that due to the circumstances of Mr Cherrington's offending, and his lack of remorse and rehabilitation, they hold serious concerns as to the safety of themselves and their family if Mr Cherrington is allowed to visit the block. They also advised that if Mr Cherrington's visitation rights were not removed this would lead to the beneficial owners and their families refusing to return to the block.

⁷ Ibid.

[26] I note that the block is now being administered by the Aata Paora Keretene Ahu Whenua Trust. This trust was not in place at the time of the hearing before Judge Harvey.

[27] On 24 January 2015 the trustees held an annual general meeting of the beneficial owners.⁸ At the meeting a unanimous resolution was passed, by the owners present, instructing the trustees to apply to this Court to remove Mr Cherrington's visitation rights and to obtain a permanent injunction preventing him from entering on the block. The trustees then met later that day where they also passed a resolution to take such steps as instructed at the annual general meeting.

[28] I am satisfied that, given the circumstances, the 2005 order should be amended so as to remove Mr Cherrington's right to visit upon the block. It was always intended that this visitation right was to be reviewed and it is appropriate to now do so given that the criminal prosecution has concluded. Mr Cherrington was convicted of those offences. The decisions of the Parole Board which have been filed in this Court demonstrate that Mr Cherrington has shown no remorse and has not undertaken any rehabilitation with respect to his offending. As such, it is not surprising that the other owners and the trustees do not want him to visit the block particularly given that this was the scene of the offending.

[29] For these reasons, I find that the 2005 order should be amended by removing Mr Cherrington's visitation rights.

Should a permanent injunction be granted?

[30] Section 19 of the Act states:

19 Jurisdiction in respect of injunctions

- (1) The Court, on application made by any person interested or by the Registrar of the Court, or of its own motion, may at any time issue an order by way of injunction—
 - (a) Against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land[, Maori reservation, or wahi tapu]; or
 - (b) Prohibiting any person, where proceedings are pending before the Court or the Chief Judge, from dealing with or doing any injury to any property that is the subject-matter of the proceedings or that

⁸ The meeting was advertised in the local newspaper.

may be affected by any order that may be made in the proceedings;
or

- (c) Prohibiting any owner or any other person or persons without lawful authority from cutting or removing, or authorising the cutting or removal, or otherwise making any disposition, of any timber trees, timber, or other wood, or any flax, tree ferns, sand, topsoil, metal, minerals, or other substances whether usually quarried or mined or not, on or from any Maori freehold land; or
 - (d) Prohibiting the distribution, by any trustee or agent, of rent, purchase money, royalties, or other proceeds of the alienation of land, or of any compensation payable in respect of other revenue derived from the land, affected by any order to which an application under section 45 of this Act or an appeal under Part 2 of this Act relates.
- (2) Notwithstanding anything in the Crown Proceedings Act 1950, any injunction made by the Court under this section may be expressed to be binding on the Maori Trustee.
 - (3) Any injunction made by the Court under this section may be expressed to be of interim effect only.
 - (4) Every injunction made by the Court under this section that is not expressed to be of interim effect only shall be of final effect.

[31] In *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust – Waitara SD s6 and 91 Land Trust* the Māori Appellate Court found:⁹

[5] When trustees are appointed to an Ahu Whenua Trust, they take legal ownership. The owners in their shares, in the schedule of owners, have beneficial or equitable ownership but do not have legal ownership, and do not have the right to manage the land or to occupy the land. Trustees are empowered and indeed required to make decisions in relation to the land and they are often hard decisions. Their power and obligation to manage the land cannot be overridden by any owner or group of owners or even the Maori Land Court, so long as the trustees are acting within their terms of trust and the general law, and it reasonably appears that they are acting for the benefit of the beneficial owners as a whole. A meeting of owners cannot override the trustees. Decisions to be taken for the land are to be the decision of the trustees. They decide who can enter and who can reside there and how the land is managed.

[32] It is for the trustees to decide who can enter and who can reside upon this block. Although Mr Cherrington is a beneficial owner,¹⁰ he does not have a right to enter upon the block unless approved by the trustees. In the present case, the trustees have passed a resolution that an injunction should be granted preventing Mr Cherrington from entering

⁹ *Eriwata v Trustees of Waitara SD s6 and 91 Land Trust – Waitara SD s6 and 91 Land Trust* (2005) 15 Aotea Appellate Court MB 192 (15 WGAP 192).

¹⁰ Mr Cherrington holds beneficial interests as a remainderman.

upon the block. They rely, in part, on a resolution passed by the beneficial owners at the annual general meeting in 2015. I consider that the trustees are acting for the benefit of the beneficial owners as a whole, as they are seeking to give effect to the resolution passed and are concerned with the safety of the owners and their families.

[33] As such, the trustees are, *prima facie*, entitled to an injunction. In *Te Hokowhitu v Proprietors of Matauri X*, the Māori Appellate Court held that even where a party may *prima facie* be entitled to an injunction, if the injury to the plaintiff is small, if it can be compensated by a small monetary payment, and if it would be oppressive to the defendant to grant an injunction, damages may be ordered in substitution for an injunction. The conduct of the parties is also relevant.¹¹

[34] In the present case, the decision of the Parole Board, dated 12 March 2015, records that Mr Cherrington had not completed any substantive programme, that he remains an untreated sex offender, and that he presents an undue risk to the safety of the community. This is not a case where the risk of injury to the trustees, the beneficial owners or their families, is small. Nor is this a case where any such injury can be compensated by monetary payment.

[35] Ms Taurau argued that the grant of a permanent injunction would be oppressive to Mrs Cherrington. She states that Mrs Cherrington is an elderly *kuia*, and that she should be allowed to visit with her son in her own home.

[36] While Mrs Cherrington would be affected by the grant of a permanent injunction, I do not consider that this is oppressive. Ms Taurau confirmed that, whilst elderly, Mrs Cherrington is still mobile and still drives her own car. There is no apparent reason why any visits with her son must occur in her home. Mrs Cherrington can visit her son elsewhere. While this may be inconvenient, I do not consider that this is oppressive in the circumstances of this case.

¹¹ *Te Hokowhitu v Proprietors of Matauri X – Matauri X*[2010] Māori Appellate Court MB 566 (2010 APPEAL 566).

[37] I also consider that any inconvenience to Mrs Cherrington and her son by having to visit elsewhere is outweighed by the risk to the beneficial owners and their families if Mr Cherrington was to return to the block.

[38] I therefore find that the grant of a permanent injunction is appropriate in this case.

Decision

[39] I grant the following orders:

- (a) Pursuant to ss 37(3) and 86 of the Act, the 2005 order is amended by adding the following further words “This order is conditional on the outcome of any proceedings brought against Parata Cherrington in another Court.”
- (b) Pursuant to ss 71, 73 and 18(1)(a) of the Act, the 2005 order is further amended by removing the following words “with the following conditions: Parata Cherrington shall not live at the house but is free to visit from time to time. When the family plan to visit they shall give Emeri Cherrington at least 48 hours notice to allow Parata Cherrington (should he be present) time to vacate. This order is conditional on the outcome of any proceedings brought against Parata Cherrington in another Court.”
- (c) Pursuant to s 19 of the Act, a permanent injunction is granted preventing Parata Cherrington from entering upon the Motatau 3B2B3 block.

Pronounced in open Court in Whangarei at 4:20pm on Wednesday this 27th day of January 2016.

M P Armstrong
JUDGE