IN THE MĀORI LAND COURT OF NEW ZEALAND
WAIKATO MANIAPOTO DISTRICT

A20180005912

UNDER	Section 85, Te Ture Whenua Māori Act 1993 Rule 9.9, Māori Land Court Rules 2011
IN THE MATTER OF	Motiti North C No 1 Block
BETWEEN	LIZA FAULKNER Applicant
AND	GRAHAM HOETE AND AUBREY HOETE Respondents

Hearing: 16 August 2018, 167 Waikato Maniapoto MB 87-93
(Teleconference)
(Heard at Hamilton)

Appearances: M Sharp for Applicant
K Feint for Respondents

Judgment: 11 December 2018

JUDGMENT OF JUDGE S R CLARK

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Introduction

[1] This decision concerns an application for the cancellation of a permanent injunction relating to land on Motiti Island. Motiti Island is located off the Bay of Plenty coast between Mount Maunganui and Maketu. It is privately owned with no public right of access. Access to the Island is by sea or air. There are currently three airstrips that provide access to the Island, including an airstrip which is located on the subject land, Motiti North C No 1 block. Both the applicant and respondents are owners in the land. The permanent injunction relates to the removal of a dwelling constructed on the airstrip by the applicant.

[2] The applicant, Ms Faulkner, applies for cancellation of the permanent injunction on the basis that there are parallel proceedings in the Environment Court which will ultimately determine whether her dwelling is in breach of the Motiti Island Environmental Management Plan ("the Plan") and required to be removed. The application is opposed by Aubrey and Graham Hoete who argue there has not been any substantial change in circumstances to justify the cancellation of the permanent injunction and, given the applicant has not complied with the order, they are entitled to the enforcement of that injunction.

Background

[3] Motiti North C 1 is Māori freehold land, 15.2769 hectares in area. It was created by partition order dated 14 March 1912.[1] There are currently 83 owners in the land with a total shareholding of 41 shares. As there is no existing management structure over the land, the owners therefore hold the land as tenants in common in unequal shares.

[4] In 2008, Graham and Aubrey Hoete constructed an airstrip on the land. In 2016, Liza Faulkner began building a dwelling on the land, which is located in the path of the airstrip. The respondents applied for an injunction. An interim injunction was granted on 8 April 2016 to restrain any work being carried out on the dwelling.[2] A substantive hearing was also set down for consideration of the grant of a permanent injunction.

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1 7 Tauranga MB 338-343 (7 T 338-342).
2 118 Waikato Maniapoto MB 30-37 (118 WMN 30-37).

[5] In a decision dated 14 March 2017, I granted the permanent injunction requiring the applicant to move her dwelling and restore the airstrip to its original condition.[3] Ms Faulkner then applied for a stay of the injunction order and filed an appeal with the Māori Appellate Court.[4] I granted the stay, pending further order by this or the Māori Appellate Court.[5]

[6] The appeal was heard on 8 August 2017. In their decision dated 31 January 2018, the Māori Appellate Court dismissed the appeal and cancelled the stay of injunction order.[6]

[7] As the applicant had not complied with the injunction order, the respondents then applied to have the permanent injunction order transmitted to the High Court for enforcement.[7] The application documentation also noted that concurrent proceedings have been filed by the respondents in the Environment Court. Those proceedings seek a declaration that the Minister of Local Government has a duty to enforce the Plan and take enforcement action to have the applicant's building removed. It was noted that the objective in filing those proceedings was to shift the burden of resolving the situation from the respondents to the Minister as the responsible territorial authority.

[8] On 6 August 2018, Ms Faulkner filed the present application for a cancellation of the permanent injunction order and in opposition to the transmittal of the order to the High Court, essentially seeking a stay of that transmittal.

[9] I heard the application by way of teleconference on 16 August 2018.[8] Both parties were represented by counsel. At the hearing, counsel for the applicant accepted that I had no jurisdiction to deal with the stay of transmittal, as such jurisdiction lies with the Chief Judge per s 85 of Te Ture Whenua Māori Act 1993. At the conclusion of the teleconference, both counsel agreed to the filing of documentation in terms of further evidence and submissions. Following the filing of such further documentation, the parties agreed that the matter could be dealt with on the papers without the need for a further hearing. All the necessary documentation is now before the Court to enable me to make a decision.

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3 *Hoete v Faulkner – Motiti North C No 1* (2017) 136 Waikato Maniapoto MB 278 (136 WMN 278).
4 Application A20160002463.
5 *Hoete v Faulkner – Motiti North C No 1* (2017) 140 Waikato Maniapoto MB 1 (140 WMN 1).
6 *Faulkner v Hoete – Motiti North C No 1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17).
7 Application A20180005251.
8 167 Waikato Maniapoto MB 87-93 (167 WMN 87-93).

[10] In terms of the application to transmit the permanent injunction order to the High Court, Chief Judge Isaac subsequently issued a decision on 25 October 2018.[9] He concluded that, while there were difficulties with overlapping proceedings before the Māori Land Court and Environment Court respectively, the respondents were entitled to seek a transmittal of the order. He further noted that Ms Faulkner would still have the opportunity to appear in any High Court enforcement of injunction proceedings. Accordingly, he ordered that the permanent injunction be transmitted to the High Court.

[11] The only issue now remaining for my determination is whether the permanent injunction order granted on 14 March 2017 should be cancelled.

Applicant's submissions

[12] Mr Sharp appeared for the applicant. He submitted that a cancellation of the permanent injunction order should be granted on the basis that there are current Environment Court proceedings which could impact on the necessity of the injunction order. He submitted that, at the conclusion of the Environment Court proceedings or at an earlier time, either party could be granted leave to apply to the Court for the injunction orders to be restored.

[13] Counsel relied on the following grounds:

(a) Ms Faulkner has filed an appearance in the Environment Court proceedings opposing the orders on the basis that her dwelling is not in breach of the relevant Plan, given her claim that the airstrip constructed by the respondents is in breach of that Plan;

(b) If the respondents do not succeed in obtaining the orders sought in the Environment Court proceedings and the Environment Court finds that the construction of the dwelling is not in breach of the Plan, Ms Faulkner intends to apply for a rehearing of the injunction order proceedings;

(c) One of the grounds the Court relied upon in granting the permanent injunction, was that the Department of Internal Affairs ("DIA") had a record

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9 2018 Chief Judge's MB 722-723 (2018 CJ 722-723).

of not taking action to deal with alleged breaches of the Plan. However, one of the central issues in the proceedings before the Environment Court is the legality of the airstrip and dwelling, and the Environment Court could declare that the Minister should take enforcement action;

(d) There would be considerable expense involved in removing the building and also in rebuilding it at a later stage;

(e) The applicant would suffer considerable loss if she demolished the dwelling but was later allowed to build on the site;

(f) In the interim, the respondents do not need to use the airstrip as there is an adjacent airstrip available which is being used by the applicants; and

(g) In all the circumstances, it would be in the interests of justice to cancel the injunction orders pending the outcome of the Environment Court proceedings.

[14] In her affidavit, Ms Faulkner argued that the Environment Court proceedings should settle the matter one way or the other. If the airstrip is found to be legal and her dwelling in breach of the Plan, she accepted the dwelling will need to be removed. On the other hand, if the airstrip is found to be in breach of the Plan, she could apply for the injunction to be lifted and ultimately apply for resource consent to complete the building.

[15] In terms of compliance with the injunction order, Ms Faulkner advised that she has been unable to move the dwelling as she cannot afford the costs of the heavy machinery required. While the building could be demolished, she advised it would be preferable to move the dwelling to preserve the investment she has already made. Regarding further cladding work on the house subsequent to the grant of injunction, Ms Faulkner noted that it was her mistaken belief that she was permitted to weather proof the framing under the terms of the injunction. She apologised for her oversight and undertook to refrain from carrying out any further work on the dwelling.

Respondents' submissions

[16] Ms Feint appeared for the respondents. She opposed the application for cancellation of the injunction on the following grounds:

(a) That there has been no material change to the circumstances since the granting of the permanent injunction;

(b) That the applicant is in contempt of Court by not complying with the injunction; and

(c) That the respondents are entitled to the fruits of the judgment and wish to enforce the injunction without any further delay.

[17] In relation to the Environment Court proceedings, Ms Feint submitted that the objective in filing those proceedings was to shift the burden of resolving the situation from the respondents to the Minister, as the proceedings have been stressful. The respondents had previously attempted to have the Minister and DIA assume responsibility for enforcement of the Plan, however no such steps have yet been taken. The most recent correspondence from DIA advised they are working with local councils to establish an enforcement process.

[18] Ms Feint submitted that the applicant's contention that the airstrip cannot be legally operated in accordance with the Plan is misconceived, as the airstrip does not require permission under the Plan to operate, given it is for private use. Even if the applicant is correct, Ms Feint noted that the present proceedings and the Environment Court proceedings have a separate legal basis in property and resource management law. In characterising the injunction as arising from a planning dispute, the applicant has overlooked the fact the permanent injunction was granted by the Māori Land Court on the basis of trespass by ouster.

[19] Ms Feint submitted that the applicant is seeking the indulgence of the Court to cancel the injunction notwithstanding that she has not complied with the Court's order and is therefore in contempt of Court. Ms Feint says that claims by the applicant that it is too expensive for her to comply with the injunction is not justified and not a relevant

consideration. Further, Ms Faulkner must bear the responsibility for having taken the risk of building on the airstrip.

[20] Finally, Ms Feint argued that the respondents are entitled to benefit from the fruits of the litigation and to enforce the permanent injunction without further delay. Ms Faulkner has already had the benefit of a stay of proceedings during her unsuccessful appeal to the Māori Appellate Court and she has not sought to pursue a further appeal. Ms Feint referred to the affidavit of Aubrey Hoete where he noted his wish to regain the benefit of the airstrip, which he says is essential and in the interests of all owners and tangata whenua. He also wished to put an end to the continuing conflict with the other owners. Ms Feint submitted that on this basis the application for cancellation of the injunction was opposed.

Legal Principles

Approach of the Māori Land Court

[21] Section 19 of the Act provides the Court with jurisdiction in respect of injunctions. It allows the Court to grant interim or permanent injunctions to prohibit certain actions, including trespass to Māori freehold land. While s 19 does not specifically provide for the cancellation of injunctions, r 9.9 of the Māori Land Court Rules 2011 provides:

> **9.9 Cancellation of injunction**
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> (1) The following persons may apply for the cancellation of an injunction:
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> (a) the person against whom the order was made; or
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> (b) a Registrar; or
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> (c) any interested person.
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> (2) The application may be considered and determined without notice in the Panui (except to the extent that it must be notified under rule 6.6), without notice to any party, and without any appearance by the applicant if it is clear that the injunction is spent or has been overtaken by other events.
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> (3) In all other cases, the application must be—
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> (a) served on all the parties in accordance with rule 4.22; and
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> (b) notified under rule 4.13; and
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> (c) set down for a hearing.

> (4) If a copy of the injunction has been sent to the High Court under section 85 of the Act, the Registrar must send to the High Court a copy of the order cancelling the injunction.

[22] This rule directs who may apply to cancel an injunction and that generally such applications must be notified, served on all parties and set down for a hearing. However, the provision does allow an application for cancellation to be considered and determined without notice where it is clear the injunction is spent or has been overtaken by other events.

[23] In terms of an application under r 9.9, there are very few decisions of this or the Māori Appellate Court which have dealt with the cancellation of an injunction in any detail. Those decisions which have granted a cancellation of injunction can be distilled into one of the following categories:

(a) Where the purpose for which the injunction was granted no longer exists. For example, where an interim injunction has been granted pending completion of proceedings and the substantive matter has subsequently been resolved;[10]

(b) Where there has been an agreement or consent to cancel the injunction by the parties;[11] and

(c) Where an interim injunction is cancelled in favour of the grant of a permanent injunction.[12]

[24] From this, it can be said that a cancellation of injunction will generally be granted where there has been a material change in circumstances that renders the injunction no longer necessary.

[25] While the overwhelming majority of cases concern the cancellation of interim injunctions, in *Kururangi – Wharekahika A13*, the Court dealt with the cancellation of a

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10 *Apatu v Colonial Life New Zealand Ltd* (1999) 157 Napier MB 64 (157 NA 67); *Grey – Tahorakuri A1 Section 16A* (2001) 74 Taupo MB 282 (74 TPO 282); *Karekare – Te Kao 64A* (2002) 6 Whangarei Appellate MB 28 (6 APWH 28); *Koopu v Trustees of Maraenui A2 Ahu Whenua Trust* (2012) 54 Waiariki MB 27 (54 WAR 27); *Roberts – Te Touwai B19A1* (2017) 162 Taitokerau MB 103 (162 TTK 103);

11 *Tawhai – Rakautatahi B2* (2002) 167 Napier MB 269 (167 NA 269); *Kururangi – Wharekahika A13* (2004) 68 Ruatoria MB 211 (68 RUA 211); and *Fenwick – Paehinahina Mourea Trust* (2005) 293 Rotorua MB 205 (293 ROR 205).

12 *Kawiti v Kawiti – Motatau 2 Section 65A* (2017) 162 Taitokerau MB 269 (162 TTK 269); *Rainey v Martin – Taimaro 2B* (2017) 162 Taitokerau MB 62 (162 TTK 62).

permanent injunction.[13] In that decision, an injunction was granted to prevent an ongoing trespass and ordered the removal of buildings erected on a marae without the consent of the beneficiaries and without the necessary building consents. The parties ultimately agreed they would comply with the legal requirements to allow the buildings to lawfully remain on the marae and the Court cancelled the injunction on the basis that it was redundant.

Approach of the General Courts

[26] It is also helpful to consider the approach of the general courts to the cancellation of injunctions. In that context, such cancellations are more commonly referred to as applications to discharge or dissolve an injunction.

[27] In the High Court, the approach adopted to applications regarding the discharge of an injunction is to consider the injunction afresh in light of any new material presented. The Court will look at whether grounds remain for the continuance of the injunction based on the same principles it applied in granting the injunction. For example, whether there is a serious question to be tried and where the balance of convenience and overall justice lies. In other words, the Court considers whether there has been a change in circumstances or material facts sufficient to alter the basis on which the injunction was granted and whether the purpose of the injunction has been fulfilled.[14]

[28] In *Millwell Holdings Ltd v Johnson* the High Court noted: [15]

> The position is no different where the application is to discharge an ex parte interlocutory injunction. The matter is examined *de novo* and the question is whether on the basis of all the evidence and all the arguments now advanced, there should be an interlocutory injunction.

[29] However, where the new material presented does not alter the basis for the original grant of injunction, the Court may decline to discharge the injunction. In *Akau'Ola v The President of the Conference of the Methodist church of New Zealand*, the High Court was

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13 *Kururangi – Wharekahika A13* (2004) 68 Ruatoria MB 211 (68 RUA 211).

14 See *United Peoples Organisation (World Wide) Inc v Rakino Farms Limited (No.1)* [1964] NZLR 737 (SC) at 738; *Nicholls v Hill* HC Auckland, CP156/90, 25 May 1990.

15 *Millwell Holdings Ltd v Johnson* (1988) 3 TCLR 93 (HC) at 101-102. See also the more recent decision in *Weil v KNC Construction Ltd* [2017] NZHC 117.

presented with new evidence in an application to discharge an interim injunction. The Court held: [16]

> The most significant factors in my decision are matters which have not been materially altered by the new evidence, and the basis for my initial view that there was an arguable case remains unchanged. There is no challenge to my findings on the balance of convenience, and indeed I was informed the defendants' concerns about the possibility of violence have not been borne out in practice.

[30] A similar line of thinking has been followed in the Australian jurisdiction. In *Fenell Tyres International Pty Ltd v Marathon Tyres Pty Ltd*, the Supreme Court of Western Australia, stated the principles for dissolution of injunction as follows: [17]

> In those circumstances the application to discharge the injunction should be approached in the same way as an application for an interlocutory injunction. That is, the plaintiffs must satisfy the court that there is a serious question to be tried; that they are entitled to final relief in the form of specific performance of the alleged agreement for the purchase of the business; that damages would be an inadequate remedy and that the balance of convenience favours the grant or continuation of the interlocutory injunction. The parties conducted the hearing on that basis.

[31] I adopt the general principles set out above and proceed to consider the application on the basis of whether there has been a change in circumstances sufficient to render the permanent injunction no longer necessary, warranting its cancellation.

Discussion

[32] The main argument of Ms Faulkner is that a cancellation of the permanent injunction should be granted, pending completion of the Environment Court proceedings. She argues that the Environment Court proceedings will ultimately determine the matter and the commencement of those proceedings represents a change in circumstances to justify the cancellation of the injunction. Ms Faulkner says the Environment Court could conclude that her dwelling is not in breach of the plan. The injunction requiring its removal will then become unnecessary and she will be saved the related expenses. If however, the Environment Court does not find in her favour, the parties could apply to reinstate the injunction at that stage.

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16 *Akau'Ola v The President of the Conference of the Methodist church of New Zealand* HC Auckland CP183/SW01 5 December 2001 at [35].

17 *Fenell Tyres International Pty Ltd v Marathon Tyres Pty Ltd* [2005] WASC 183 at 25.

[33] The respondents do not agree with Ms Faulkner's claims and argue that there has been no material change in circumstances since the grant of the permanent injunction.

[34] The difficulty I have with Ms Faulkner's argument is that the filing of proceedings in the Environment Court has not changed the underlying circumstances on which the permanent injunction was granted. The permanent injunction was granted on the basis of trespass by ouster, in that the respondents were ousted from being able to use part of the land as an airstrip. The filing of the Environment Court proceedings has not changed those facts. The dwelling has not been removed and remains on the airstrip and the respondents continue to be unable to use the airstrip. Clearly, the issue has not been resolved and the purpose in granting the permanent injunction remains.

[35] The proceedings filed by the respondents in the Environment Court seek a declaration under the Resource Management Act 1991 that the Minister for Local Government, as the territorial authority for Motiti Island, has a duty to enforce compliance with the Plan in relation to Ms Faulkner's dwelling. As Ms Feint noted, the objective in commencing those proceedings was to shift the burden of resolving the situation from the respondents to the Minister, who should more appropriately have shouldered that burden. Therefore, the proceedings in the Environment Court are pursued in a different jurisdiction which does not affect the jurisdiction of this Court to grant an injunction based on trespass by ouster in relation to Māori freehold land.

[36] Effectively, what I have been asked to do is carry out a review of my own decision. However, there do not appear to be any changes in circumstances other than the fact the respondents have sought declarations in the Environment Court. I do not consider that is a sufficient ground to warrant the cancellation of the injunction order.

[37] I also find that the suggestion by the applicant that a cancellation of the injunction be granted in anticipation of a decision by the Environment Court to be an unusual proposition. I note that if there is subsequently any material changes in circumstances which affect the continuing relevance of the injunction, the parties can always file further applications at that time.

Decision

[38] The application for the cancellation of the permanent injunction is dismissed.

Pronounced at am/pm in Hamilton on Tuesday this 11th day of December 2018.

S R Clark
JUDGE