IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

30/10

M. Nos. 955-965/84

1287

BETWEEN H T K T L K G T P G G

RAWIRI,
THOMPSON,
ANDREWS,
ANARU,
THOMPSON,
RAWIRI,
BLAIR,
RAWIRI,
LEE,
ROGERS, and
THOMPSON

Appellants

A N D POLICE

Respondent

Hearing: 20th September, 1984.

Counsel: D. A. R. Williams for Appellants.
S. Moore for Respondent.

Judgment: 12 October 1984

JUDGMENT OF TOMPKINS, J.

The eleven Appellants were each separately charged in the District Court at Auckland that -

> On the 2nd day of February, 1984, at Oneroa, Waiheke Island, did commit an offence against the Maori Affairs Act, 1953, s.385(1)(a), in that he trespassed on land at Waiheke Island, namely, the Department of Maori Affairs, Waiheke Island Development Scheme, being land which is subject to Part XXIV of the Maori Affairs Act, 1953, refused to leave that land on which he was a trespasser, after he had been warned that he was a trespasser and directed to leave that land by Dixon Wright, a person authorised in that behalf by the Board of Maori Affairs.

On the 10th May, 1984, they pleaded not guilty to the charge laid against each of them. At the hearing that ensued each appeared in person.

The learned District Court Judge delivered his decision on the 12th May, 1984. He convicted each of the Appellants. Each were fined $30 with costs of $20. The appeal of each is against the conviction and sentence.

All of the Appellants are of the Ngati Paoa tribe. At the time of European settlement the Ngati Paoa occupied Waiheke Island. The land involved in these charges is part of an area that the Ngati Paoa sold to the Crown in 1858 for £800.

The land upon which the trespass was alleged to have been committed was controlled by the Board of Maori Affairs ("the Board") under Part XXIV of the Maori Affairs Act, 1953. The Board had made a decision to dispose of the land. Settlement was to take place on the 1st February, 1982.

The Appellants considered that if there were to be a disposition of the land then it should be handed back to the descendants of the original owners or their representatives. They claimed that there had not been prior to the decision to dispose of the land adequate consultation with the appropriate authorities. They and others had taken a variety of steps to try to prevent the disposition of the land by approaches to the Ombudsman, the Department of Maori Affairs, members of Parliament, and the Minister of Maori Affairs. There is, I was advised, pending an application to the Waitangi Tribunal.

It was for these reasons that the Appellants decided to camp on the land, partly by way of protest and partly in the hope that this may prevent settlement of the disposition on the 1st February, 1984.

I set these facts out as background only. They were not directly relevant to the issues before the District Court or before this Court on appeal. But they explain the Appellants'

action. They also have some bearing, if only by way of illustration, on the legal significance of the steps that were taken on behalf of the Board.

Mr. Wright, a director of the Department of Maori Affairs at Hamilton, was instructed by his head office to go to Waiheke Island in order to serve a warning notice on the Appellants who were, by then, on the Waiheke Island Development Scheme administered by the Board. He did so on Wednesday, the 1st February, 1984. He found a group of people and their tents on the land. He spoke to them explaining why he was there and asked them to leave. He left them for a while, returning between 9.30 and 10 p.m. that evening, when he was told that they had decided that they would not leave the property. The next day, the 2nd February, 1984, he came to Auckland, then returned to Waiheke Island with members of the police later that afternoon. He and those with him approached the people again and spoke to them. Some of them left. Eleven people (the Appellants) remained. He then read out to them a formal warning pursuant to s.385 of the Act and to ss. 3 and 4 of the Trespass Act, 1980, that they were trespassing, that they must leave, and that they must stay off the place where they were. Having read it to them he then attempted to hand each of them a copy, but they declined to accept it. The eleven Appellants were then arrested for trespass.

The learned District Court Judge's judgment did not review in any detail either the facts or the relevant legal issues. The significant part of his decision reads:-

> " The prosecution have satisfied me that they have established all the requirements of the offence, that the land was declared to be under the control of Part XXIV of the Maori Affairs Act, and was duly gazetted and notice (sic). I have a certificate from the Land Registrar and that evidence is conclusive. The power to order you to leave was delegated to an officer of the Department officially and formally and correctly. "

At the hearing before me two grounds were advanced in support of the Appellants' appeal against conviction. They were:-

(1) The authorisation to Mr. Wright to give the trespass warning was a nullity because of non-compliance with s.7 of the Act.

(2) The prosecution had failed to prove that the consent of the Board to the commencing of proceedings had been given as was required by s.385(4) of the Act.

The first ground was directly raised by one of the Appellants in cross-examination of Mr. Wright. The learned District Court Judge quite rightly ruled that the validity of the authorisation given to Mr. Wright was not a matter of evidence, but a legal question for him. However, in his decision he did not deal with it other than to the extent I have indicated. The second ground was not raised in the Court below. It was therefore not referred to in the learned District Court Judge's judgment.

In dealing with the first ground I commence with s.385. Subs. (1) provides that a person commits an offence who -

" (a) Trespasses on any land that is subject to this part of this Act . . . . . and neglects or refuses to leave the land after having been warned that he is a trespasser and directed to leave the land by any person authorised in that behalf by the Board. "

The issue therefore is whether Mr. Wright was a "person authorised in that behalf by the Board".

The prosecution relied on a form of approval produced to the Court as Exhibit 5. It is headed up -

" APPROVAL TO ISSUE NOTICE TO TRESPASSERS IN TERMS OF SECTION 385 MAORI AFFAIRS ACT. "

The first four paragraphs give the factual

background. Paragraphs 5 and 6 read:-

" 5. On 31 January a group of about 15 persons invaded the block, camped near the main entrance and threatened to prevent any access on or off the property. It is proposed that the stock be tallied and valued on 2 February, and that the manager move out and Mr Evans move in on that date. It will be necessary therefore to ensure that the squatters do not block access to the property.

6. The board is therefore asked to authorise the director in terms of section 385 of the Maori Affairs Act 1953 (see copy attached) to issue a trespass notice. Section 385 provides that with the prior consent of the board a warning notice may be issued and trespassers directed to leave. Persons refusing to leave or obstructing officers of the board will be liable on conviction to a fine of up to $100 or up to 3 months' imprisonment. It is recommended that the board approve issue of a notice forthwith, and authorise Mr. Dixon Wright, Director, Department of Maori Affairs, Hamilton to implement the board's decision. "

Because of the significance of the manner in which the document was dealt with, I reproduce what follows after paragraph 6:-

(B S Robinson)
Deputy Secretary

Confirmed
~~APPROVED~~ by the BOARD
Date 7 FEB 1984
Board Secretary
Minute Number 1552

Approve:
~~Declined~~

Recommendations Approved by Circulation
Board Secretary
1-2-84

1 FEB 1984

1 FEB 1984

1 FEB 1984

1 FEB 1984

1 FEB 1984

1 FEB 1984

In reliance on that purported approval, Mr. James, the Secretary of the Board, on the 2nd February, 1984, gave to Mr. Wright an authority which he signed as Board Secretary and which reads:-

" Pursuant to a decision of the Board of Maori Affairs dated 1 February 1984 (copy attached) and in terms of Section 385 of the Maori Affairs Act 1953 you are authorised and directed to:

(a) personally deliver a written notice warning the trespassers off the land which comprises part of the Waiheke Island Development Scheme;

(b) at the same time give the trespassers a verbal direction to leave after which any trespasser who neglects or refuses to leave will be warned that he or she will be liable to be arrested. "

It was pursuant to this authority that Mr. Wright then gave to the eleven Appellants the formal warning to which I have already referred.

Subs. 5(2) provides that the Board shall consist of fourteen persons, being the Minister, the Secretary for Maori Affairs, the Director-General of Lands, a Member of Parliament representing a Maori electorate nominated in writing by the other Members of Parliament representing Maori electorates, the President of the New Zealand Maori Council, the President of the Maori Women's Welfare League, the Chairman of the Board of Trustees of the Maori Education Foundation, and six other persons being Maoris appointed by the Minister. The evidence does not establish whether all these positions were filled on the lst February, 1984.

S.7 governs meetings of the Board. Relevant to present purposes are subss. (7), (8) and (9). They read:-

" (7) At all meetings of the Board five members shall form a quorum.

(8) On all motions before the Board the Chairman shall have a deliberative vote and in the event of an equality of votes shall also have a casting vote.

(9) Subject to the foregoing provisions of this section, and of any regulations that may, for the time being, be in force in relation to the conduct of meetings

of the Board, the Board may regulate its procedure in such manner as it thinks fit. "

It was submitted by Mr. Williams on behalf of the Appellants that a person can only be authorised by the Board for the purposes of s.385(1)(a) of the Act by a decision taken at a meeting of the Board. There was no meeting of the Board on the 1st February, 1984. Therefore there was no valid authority given to Mr. Wright to give a s.385(1)(a) warning. Therefore the Appellants cannot be guilty of an offence under s.385.

Mr. Moore, for the Respondent, accepted that there was no evidence of a meeting of the Board on the 1st February, 1984. He contended that the scheme of the Act does not require a s.385 authorisation to be by way of a resolution passed at a meeting. Alternatively, he submitted that circulation of the approval to enough members as would amount to a quorum constituted a meeting for the purpose of giving the appropriate authority.

Although there was no direct evidence concerning how the approval was completed, I consider it to be a clear inference that on the 1st February, 1984, the approval document was circulated to six members of the Board who that day signed it. That action was taken by the Board Secretary to be an approval by circulation of the recommendations contained in the document. Then six days later, on the 7th February, 1984, the approval obtained by circulation was confirmed at a meeting of the Board held on that day.

So was Mr. Wright, on the 2nd February, 1984, a person authorised by the Board to give the warning? He would be so authorised if there had been a valid decision of the Board to that effect. I am satisfied that a valid decision of the Board can only be made at a meeting of the Board. My reasons are these.

First, the Act prescribes no way for the Board to make its decisions other than at a meeting held in accordance with s.7. There is no power to make decisions by circulation to members, entry in the Minute Book, or the like. Certainly the Board can regulate its procedure in such manner as it thinks fit (s.7(9)). But I do not consider that this empowers the Board to decide that decisions can be taken other than at meetings. In any event there was no evidence that the Board had so decided.

The Board is a statutory body. What the statute does not expressly or impliedly authorise is to be taken to be prohibited (9 Halsbury's Laws of England, 4th Ed., 1333). I can find nothing in the statute that expressly or impliedly authorises the Board to take decisions other than at meetings.

Mr. Williams, by way of contrast, referred to the Commerce Act, 1975, and in particular the provisions contained in that Act relating to the Commerce Commission. Many of those provisions are similar but not identical to the provisions in the Act relating to the Board, but s.7A provides:-

> " 7A. A resolution in writing signed or assented to by letter, telegram, cable or telex message by all the members of the Commission or (as the case may require) of a division of the Commission necessary to constitute a quorum, shall be as valid and effectual as if it had been made at a meeting of the Commission or division duly called and constituted by those members. "

The Maori Affairs Act contains no such provision.

Secondly, it accords with the objective of the provisions in the statute relating to the operation of the Board to hold that decisions can only be taken at meetings. As I have already indicated, there are fourteen members of the Board. Clearly that membership has been prescribed carefully in a way to ensure that the Board should have available to it a wide range

of representative opinion, particularly from the Maori community. It accords with that approach that decisions should not be made by the Board without the opportunity of all members of the Board able to attend a properly called meeting to consider any proposed decision and to debate it openly at the meeting. Only thus can the decision truly be said to be that of the members of the Board. To allow decision by circulation would be to deprive members of the Board of the benefit of hearing the views and arguments of others.

This case illustrates the importance of that approach. The issues to be determined relating to this land at Waiheke were clearly those where Maori cultural attitudes and views were relevant. The procedure prescribed in the Act should have ensured that before the Board made a decision affecting matters of this kind there should at least have been an opportunity for full discussion. This objective can hardly be said to have been achieved where the authority was signed as the result of it being circulated to only six of the members of the Board.

Thirdly, this approach is supported by authorities relating to limited liability companies.

In D'Arcy v. The Tamar Kit Hill and Callington Railway Co. (1867) L.R. 2 Exch. 158, the court was concerned with whether the seal of the company had been affixed with proper authority. The secretary claimed to have been authorised by three directors to affix the seal. However, the assent of two out of the three had been obtained at a private interview at the house of one of them, the third when the secretary met him in the street. This decision has been doubted to the extent that it relates to the indoor management rule, but the comments made concerning the holding of a meeting I consider to

be relevant to the issue in the present case. Bramwell, P. considered that the seal could only be properly affixed by the authority of such a number of directors as had power to act for the company, acting jointly and as a board. He added:-

> " This is clearly the intention of the Act; and it is an obvious consideration that, if it were otherwise, a quorum of directors might meet at one place with power to act for the company, and another quorum might, at the same time, meet at another place with equal power and come to an opposite determination. "

Pigott, B. succinctly expressed his view on the issue at p.163:-

> " Three directors have given their assent to the issuing of this bond, but were they a meeting? Clearly they were not; but, on the contrary, the secretary casually picked up three members of the body of directors and obtained their assents separately. "

In Re Associated Color Laboratories Ltd. (1970) 12 D.L.R. (3d) 338, McDonald, J. of the British Columbia Supreme Court, held that a resolution assented to by all the directors of a corporation seriatim and not assembled at a meeting of the Board is not the act of the company. His judgment collects the relevant authorities from Canada and the United Kingdom, and also refers to texts from those countries and the United States. He cited D'Arcy's case and also the decisions of Cozens-Hardy, J. in Re Haycraft Gold Reduction and Mining Co. (1900) 2 Ch. 230, and Martin, J. in Harris v. English Canadian Co. (1906) 3 W.L.R. 5, both of which followed with approval the judgments in D'Arcy's case, as authority for the proposition that directors must act together as a Board. He discussed the possibility of directors having a meeting over the telephone, but, concluded that in the general context of the

exercise by directors of their powers the word "meeting" has not yet gained a meaning wider than the ordinary one, namely, the coming together of two or more persons face to face so as to be in each other's presence or company.

In Proprietors of Parininihi Ki Waitatara Block v. Viking Mining Co. Ltd. (1983) N.Z.L.R. 405, the Court of Appeal was concerned with the validity of the resolution of a Maori incorporation to grant a profit à prendre. Cooke, J. at 414, expressed the view that the contractual powers of an incorporation are not intended to be exercised without authority from a meeting of the committee of management. He referred to the relevant authorities being collected in the Associated Color case.

It is for these reasons that I am satisfied that a valid decision of the Board can only be made at a properly called meeting of the Board. It cannot be made by circulating the proposal to a quorum of members and obtaining their separate assent. Nor could it be made by, in that manner, obtaining the separate assent of all the members.

On the 2nd February, 1984, there had not been a properly called meeting of the Board where the proposal to authorise Mr. Wright had been considered and decided. So as at that date he had not been validly authorised to issue a s.385 warning. Nor is this conclusion affected by the decision taken at the Board meeting on the 7th February, 1984, to confirm the authority purported to have been given. Mr. Moore, in my view rightly, did not contend that that decision could have retrospective effect to validate what had already occurred on the 2nd February, 1984.

An essential ingredient of the charge was not proved. The Appellants therefore succeed on this ground.

The second ground turns on s.385(4) of the Act. It provides:-

> " (4) No proceedings shall be commenced under this section except with the consent of the Board. "

It was submitted on behalf of the Appellants that there was no evidence that the Board had given its consent to these proceedings being commenced under s.385. This is correct. As I have indicated this issue was not raised in the court below. The Respondent did not give any evidence to establish the consent of the Board.

In support Mr. Williams referred to the decision of Ongley, J. in Columbus Maritime Services Ltd. v. Wellington Harbour Board (M.5/79, Wellington Registry, 3.4.79) where the court was concerned with a prosecution under s.60(7) of the Marine Pollution Act, 1974. That subsection provided that proceedings shall not be instituted "except by a person authorised in that behalf by the Harbour Board". The evidence failed to establish that the informant had been so authorised. Ongley, J. held that the Board must be shown to have turned its corporate mind to the question of authorising a particular prosecution or prosecutions of that sort generally, that it was necessary to prove by evidence at the hearing that authority had been given by the Board, and that it must be strictly proved that the procedure had been followed.

Mr. Moore, for the Respondent, met this submission by referring to the judgment of the Court of Appeal in R. v. O'Connell (1981) 2 N.Z.L.R. 192. The court was concerned with

a prosecution under the Indecent Publications Act, 1936, and in particular whether the leave required to initiate the prosecution had been given. Somers, J., delivering the judgment of the court, said at p.196:-

> " It is desirable too to say something about the type of point taken in this case. The authorities are not entirely uniform, but we consider the position at trial to be (1) in the absence of objection on behalf of a defendant the existence of any necessary leave or consent to prosecute will be presumed; (2) if no evidence of authority is given and the point is raised after the close of the prosecution case, leave should ordinarily be given to prove the authority; (3) if without objection being taken it emerges at the trial that there was in fact no authority the point should be allowed and will be decisive. "

Somers, J. had expressed similar views in the context of a prosecution under s.182 of the Transport Act, 1962, in Timaru Transport Co. Ltd. v. Ministry of Transport (1980) 2 N.Z.L.R. 638.

Mr. Moore then applied for leave to call further evidence on the basis that the point not having been taken in the court below it was appropriate for leave to be granted in this Court on the hearing of the appeal. He cited in support of that approach the judgment of Thorp, J. in Morgan v. Collector of Customs (M.1157/81, Auckland Registry, 19.5.82). There Thorp, J. reviewed the authorities. He concluded at p.15 of the unreported judgment:-

> " My final assessment of the position is that, whatever approach this Court shall adopt in its consideration of applications to allow leave to call additional evidence to remedy other types of defect, the reasoning necessarily involved in the decision of the Court of Appeal in O'Connell's case to grant leave at the stage of a second or further appeal from the initial decision, means that this Court is bound to grant leave to remedy defective proof of status authority or consent to commence prosecutions unless there is some special reason against the grant of leave. "

Mr. Williams formally opposed Mr. Moore's application. However, having regard to the authorities to which I have referred, I was in no doubt that the application should be granted. I made an order accordingly.

Mr. Moore then indicated that he was not in a position to call any further evidence. He did not apply for an adjournment to enable him to do so. I should add that although this point was not taken in the court below, it was a ground of appeal expressly set out in each notice of appeal. It was more expressly set out in the memorandum of points to be taken on appeal. So the Respondent was well aware that the issue was going to arise at the hearing of the appeals.

The Respondent having failed to take advantage of the leave that was granted to call further evidence, I consider that the Appellants' submission that the prosecution has failed to prove the necessary consent should be upheld.

The Appellants have succeeded on both grounds advanced. The convictions against each of them are set aside. The Appellants are entitled to costs on the hearing of this appeal, which I fix at $350.

Solicitors:

Denholm, Reeves & Co., Auckland, for Appellants.

Crown Solicitor, Auckland, for Respondent.