IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CRI 2008-443-28

BETWEEN	RUSSELL VICTOR AND PARANI JOSEPHINE GIBBS Appellants
AND	NEW PLYMOUTH DISTRICT COUNCIL Respondent

Hearing: 5 March 2009

Appearances: Miharo Armstrong for Appellants
Susan Hughes QC for Respondent

Judgment: 26 March 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 1:00 pm on 26 March 2009

SOLICITORS
Rangitauira & Co (Rotorua) for Appellants
Susan Hughes QC (New Plymouth) for Respondents

Introduction

[1] Russell and Parani Gibbs appeal against their convictions in the District Court at New Plymouth on one charge laid by the New Plymouth District Council of failing to obtain a permit to construct a building: s 40 Building Act 2004. The Council cross-appeals against the fines of $2,500 imposed on each.

[2] It is common ground that the Gibbs' constructed a wharenui or meeting house at their rural property in Taranaki without first obtaining a permit. The principal ground of appeal advanced by Mr Miharo Armstrong, who did not appear for the Gibbs' in the District Court, is that the provisions of the Te Ture Whenua Mäori Act 1993 (the TTWM Act) and the Mäori Reservations Regulations 1994 (the MRR) exempt them from compliance with the Building Act.

Background

[3] The Gibbs' whanau have owned a farm at Tongaporutu for over 100 years. On 14 May 2004 they applied to the Mäori Land Court for a recommendation that 2.03 hectares of the property be set aside as an urupā or burial ground 'for the common use and benefit of [the Gibbs]': s 338 TTWM Act. The reservation was to be known as the 'Gibbs' Whanau Mäori Reserve'.

[4] A report prepared by a Deputy Registrar of the Mäori Land Court noted that the land was owned by a family trust and that:

> The whanau wish to set aside an area as urupā. There is urgency for this case because Mrs Gibbs' father is very ill and has only a short time to live… Mrs Gibbs' father wishes to be buried on the family farm but before that can happen an urupā needs to be gazetted… The land remains vested in Mr and Mrs Gibbs … as trustees of the family trust and there is no need for trustees to be appointed for the reservation at this time as this is a family urupā only.

[5] Judge LR Harvey made an order in the Mäori land Court on 21 May 2004 delineating the area of 2.03 hectares on a plan which had been filed with the Court setting it aside:

> as a Mäori Reservation to be known as the Gibbs' Whānau Mäori Reserve for the purposes of an urupā for the common use and benefit of Parani Josephine Gibbs, her parents, her husband, Russell Victor Gibbs, and her descendants.

[6] Mr Gibbs Senior and the Gibbs' daughter, Pearl Gibbs, were both buried in the reservation. Following the daughter's unveiling on 22 October 2005 the Gibbs' whanau and hapu began discussions about constructing a wharenui. The tohunga Te Ru Koriri Wharehoka presented building plans. After discussion among the wider whanau, agreement was reached that the wharenui should be built within the existing reservation. In the District Court, Judge Graham Hubble found that the building was later constructed according to traditional specifications and with considerable engineering skill. The building was completed by November 2007 but without a permit.

[7] A senior Council officer wrote to the Gibbs' on 12 November 2007 following a visit to the property 'to assess the status of a reported unauthorised building'. The Gibbs' had declined Council permission to measure and inspect the building. Council pointed out the obligations imposed by s 40 Building Act and, despite the Gibbs' failure to apply for a permit, invited them to apply for a certificate of acceptance. It referred to the prospect of legal proceedings and invited a response.

[8] The Gibbs' wrote back on 3 December. They described the building as a 'whanau wharenui which is built on a Mäori Reservation'. They said that they exercised their rights under the Treaty of Waitangi and the MRR to build the wharenui. They declined to accept Council's invitation to apply for a certificate of acceptance. A prosecution followed.

District Court

[9] Evidence was called at the defended hearing in the District Court from Mr Peter Scantlebury, the Building Team Leader at Council, and from the Gibbs' who represented themselves.

[10] An unusual aspect of the hearing was emphasised on appeal by Ms Susan Hughes QC who also appeared for Council in the District Court. Mr Scantlebury gave evidence that the building was not in fact constructed on the reservation but on another part of the farm. Mr Gibbs denied this evidence. It was the subject of limited challenge at trial before the Judge indicated in an exchange with Ms Hughes and Mr Gibbs that 'we accept that in anticipation that it is a Mäori reservation…'. The rest of the hearing proceeded on this assumption, and the Judge noted the dispute but held that 'for the purpose of this hearing … I am assuming the building is on the Mäori reservation set aside for an urupā'.

[11] With respect, this approach was unsatisfactory. The Gibbs' defence, as I shall explain, was predicated on the legal existence of a reservation and the factual location of the wharenui within it. A finding on the latter issue was central. Given its absence, I will proceed on the assumption, which may be factually incorrect, that the building is situated on the designated reservation.

[12] Judge Hubble carefully examined the legal foundation for the Gibbs' defence by reference to the TTWM Act, the MRR and the common law. He accepted Ms Hughes' submission that those legislative provisions did not exempt the Gibbs' from compliance with the Building Act and convicted them accordingly.

Appeal

[13] Mr Armstrong adopted a closely reasoned analysis of the relevant statutory provisions to support a submission that the Gibbs' as trustees of the reservation were themselves a separate legal authority having power to authorise construction of a wharenui without a building consent.

[14] Section 338 TTWM Act materially provides:

> (1) The Chief Executive may, by notice in the Gazette issued on the recommendation of the Court, set apart as Mäori reservation any Mäori freehold land or any General land—
>
> (a) for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground,

spring, well, timber reserve, catchment area or other source of water supply, or place of cultural, historical, or scenic interest, or for any other specified purpose; or

(b) that is a wahi tapu, being a place of special significance according to tikanga Mäori.

…

(3) Except as provided in section 340 of this Act, every Mäori reservation under this section shall be held for the common use or benefit of the owners or of Mäori of the class or classes specified in the notice.

…

(7) The Court may, by order, vest any Mäori reservation in any body corporate or in any 2 or more persons in trust to hold and administer it for the benefit of the persons or class of persons for whose benefit the reservation is made, and may from time to time, as and when it thinks fit, appoint a new trustee or new trustees or additional trustees.

(8) The Court may, on the appointment of trustees under subsection (7) of this section, or on application at any time thereafter, set out the terms of the trust, and subject to any such terms, the Mäori reservation shall be administered in accordance with, and be subject to, any regulations made under subsection (15) of this section.

[15] By virtue of s 338A:

(1) Regulations made under section 338(15) may, in relation to the trustees of Mäori reservations generally or in relation to the trustees of any specified Mäori reservation or of any specified class of Mäori reservations,—

(a) specify -

(i) terms for which those trustees or any of them are to be appointed:

(ii) circumstances in which those trustees or any of them cease to hold office:

(iii) circumstances in which those trustees or any of them may be removed from office by the Court:

(iv) powers, authorities, and discretions that may be exercised by those trustees (in addition to those conferred on them by this Act) and the manner in which those trustees or any of them may exercise their powers, authorities, and discretions (including those conferred on them by this Act or the Trustee Act 1956 or both):

(v) powers, authorities, and discretions conferred by the Trustee Act 1956 that may not be exercised by those trustees:

(vi) conditions that must be complied with by those trustees:

(b) authorise the Court to exercise in relation to those trustees (but not to the exclusion of the High Court) any of the powers and authorities conferred on the High Court by the Trustee Act 1956.

(2) Nothing in subsection (1) limits—

(a) the powers of the Court under section 338(8); or

(b) the generality of section 338(15).

[16] Mr Armstrong also refers to s 2 TTWM Act, affirming Parliament's intention that the statute is interpreted in the manner that best furthers the principles of the preamble. That provision emphasises the desirability of reaffirming the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi. Furthermore, the section provides that its powers are to be exercised as far as possible in a manner that facilitates and promotes the development and control of Mäori land as taonga tuku iho by Mäori owners.

[17] Mr Armstrong also relies on reg 8 MRR which provides:

The trustees of any reservation may, subject to any order of the Court,-

(a) Authorise activities on the reservation by any person or class of persons:

(b) Issue permits in relation to any activity on a reservation …

[18] Mr Armstrong submits that reg 8(b) is particularly material. It must be considered in the light of s 2 and the preamble, and the protection of rangatiratanga as guaranteed under the Treaty and in a manner which promotes the development and control of the reservation by Mäori owners. Thus the owner's powers to 'issue permits in relation to any activity on a reservation' must include the power to authorise construction of a building without a building consent. Accordingly, the Gibbs' were not bound to comply with the Building Act.

Decision

(1) Conviction

[19] I agree with Mr Armstrong that the intent of the combined provisions of the TTWM Act and the MRR is to promote the concept of development and control of Mäori reservations by Mäori owners. However, at a principled level I disagree with him that this legislative intent exempts those who control reservations from compliance with the provisions of the Building Act; and at an interpretative level I disagree that reg 8(b) might arguably provide a specific exemption. Furthermore, even if those two conclusions are wrong, the Gibbs' appeal would fail because there is no evidence of their appointment as trustees of a reservation designated for the purpose of a meeting place. I shall address each ground separately.

(a) Building Act

[20] The starting point, as Mr Armstrong accepts, is *Taiwhanga v Thames-Coromandel District Council* HC Ham CRI 2005-075-1321 17 August 2006. In dismissing an appeal against a conviction for carrying out building work without a consent, Rodney Hansen J said this in *Taiwhanga*:

> [8] The Building Act is a statute of general application. There is nothing to suggest that Mäori or Mäori land are exempt from its purview or that the exercise of powers conferred by it are conditional on prior consultation.
>
> [9] Section 3 of the Act states that its purpose is to provide for the regulation of building work, the establishment of a licensing regime for building practitioners and the setting of performance standards for buildings, to ensure, among other things, that people who use buildings can do so safely and without endangering their health. It is self-evident those purposes could not be achieved if Mäori and buildings on Mäori land were exempt from the provisions of the Act. And there is nothing in its provisions to suggest that is the case. As Mr Frogley pointed out, the only section in the Act which refers to Mäori land is s 395 which provides that Part X of Te Ture Whenua Mäori Act 1993 applies to the service of notices under the Act.

[21] Judge Hubble applied *Taiwhanga*. While accepting Rodney Hansen J's statement that the Building Act is of general application, Mr Armstrong seeks to

distinguish *Taiwhanga* on the ground that the Court was there addressing the question of whether the Building Act applies to normal Mäori freehold land, not the separate question of whether or not the statute applies to a Mäori reservation.

[22] However, I agree with Ms Hughes that Rodney Hansen J's emphasis upon the Act's primary purpose in ensuring that those who occupy or use buildings can do so safely and that minimum standards are met applies with equal force to all buildings. This proposition is confirmed by provisions of the Act additional to s 3, noted by Rodney Hansen J in *Taiwhanga*, such as s 17 which provides:

> All building work must comply with the building code to the extent required by this Act …

[23] Furthermore, s 40 is absolute in its prohibition on carrying out any building work 'except in accordance with a building consent'. A limited number of specified exemptions are allowed but none relate to Mäori reservations or Mäori land: s 41(1). The reason, with respect, is obvious. All users of a building, whatever the status of the land on which it is constructed, are entitled to the protection of the performance standards mandated by the Building Act. A person intending to carry out building work, except where subject to a specified exemption, must apply to the authorised building consent authority: s 44(1). The power to issue building consents is expressly limited to a building consent authority: s 48. The Gibbs' do not argue that they fall within the definition of a building consent authority: s 273(1)(a).

[24] I do not discern any inconsistency between the Building Act and the governance provisions of the TTWM Act or the MRR, which promote Mäori autonomy in controlling and developing a reservation. Both the preamble and s 2 emphasise retention, occupation, development and use of Mäori land subject to the TTWM Act. That concept is discrete from the duty vested in an authorised consent authority to set and enforce performance standards, designed to ensure safety and minimise danger, for buildings constructed on all land, whether on a statutory reservation or elsewhere. Compliance with the building consent requirements of the Building Act is compatible with the autonomy vested in those who control Mäori land, and the relevant statutory pattern does not disclose a ground of principle or policy for exempting a Mäori reservation.

(b) *MRR*

[25] This conclusion would be sufficient to dispose of the appeal. However, even if it is wrong, I disagree with Mr Armstrong's interpretation of reg 8(b). Assuming for the moment compliance with s 338(1)(a), the Regulations are designed to authorise specified activities by the trustees. Reg 8(b) entitles the trustees to issue permits relating to activity on a reservation. The power to issue permits logically implies delivery of a written authorisation as provided by reg 9 which identifies the activities requiring that authority. The activities are expressly limited to the use of a building on the reservation, promoting or holding a hui or sports event or such other activities or events as the trustees determine require their prior written authorisation. Building a wharenui does not fall into any categorised activity.

(c) *Reservation*

[26] In any event, this appeal must fail at a factual level. As Ms Hughes submits, this reservation was established for the express purpose of a burial ground: s 338(1)(a). It was to be held for the common use or benefit of the Gibbs' whanau: s 338(3). Because the area was to be used for a family urupā only, the Mäori Land Court did not exercise its statutory discretion to appoint trustees for the reservation: s 338(7).

[27] Mr Armstrong accepts that no evidence of the Gibbs' appointment as trustees was led in the District Court. Notwithstanding this factual hiatus, I granted the Gibbs' leave to produce any documents which prove they were formally appointed. They produced a copy of the Mäori Land Court's minute issued on 21 May 2004. However, that document merely confirms that the Court never appointed the Gibbs' as trustees of the reservation, for the apparent reason that the area was set aside for the narrow and limited purpose of a family urupā, under constraints of urgency, and not for the wider purpose now argued. Use of the land for the purpose of a wharenui or meeting place is discrete and different from that granted by the Court and would require specific orders and the formal appointment of trustees. Moreover, as

Ms Hughes submits, there is no evidence of the Gibbs' compliance with the notice and advertising requirement of reg 3.

[28] The Gibbs' appeal against conviction fails on each of these three grounds and is accordingly dismissed.

(2) Sentence

[29] Ms Hughes submits that the fines of $2,500 imposed in the District Court on each of Mr and Mrs Gibbs were manifestly inadequate. She has provided a comprehensive argument in support based upon a comparative evaluation of comparable cases.

[30] Mr Armstrong raises a jurisdictional defence. He submits that Council must obtain the consent of the Solicitor-General to pursue an appeal against sentence: s 115A(2) Summary Proceedings Act 1957. Ms Hughes accepts that, first, the Summary Proceedings Act applies and, second, Council has not obtained the Solicitor-General's consent. She concedes that if Council had wished to appeal against the sentence ab initio then s 115A would have a fatal effect. However, in the absence of authority, Ms Hughes submits that the Court has an inherent jurisdiction to determine Council's appeal based upon what she says is the analogous right of this Court on an appeal against sentence to review the adequacy or otherwise of that sentence.

[31] I agree with Mr Armstrong. Council as the informant has an express right of appeal against the sentence: s 115A. It has elected to exercise that right here. Accordingly, without the Solicitor-General's consent, I have no jurisdiction to consider the appeal. Council's appeal against sentence is therefore dismissed.

Result

(1) The Gibbs' appeal against conviction is dismissed.

(2) Council's cross-appeal against sentence is also dismissed.

(3) There will be no order as to costs.

Rhys Harrison J