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

Judgment: 4 June 2009 (on the papers)

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.30 pm on 4 June 2009

SOLICITORS
Jackson Reeves (Tauranga) for Appellants
Susan Hughes QC (New Plymouth) for Respondent

Introduction

[1] In a judgment delivered on 26 March 2009 I dismissed an appeal by Russell and Parani Gibbs 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. It was common ground that the Gibbs' had constructed a wharenui or wharemate or meeting house at their rural property in Taranaki without obtaining a permit. However, on appeal they contended that the provisions of the Te Ture Whenua Mäori Act 1993 (the TTWM Act) and the Mäori Reservations Regulations 1994 (the MRR) exempted them from compliance with the Building Act.

[2] The Gibbs' have since applied to this Court for an order granting them leave to appeal to the Court of Appeal against my judgment. They say that it raises a question of law which by reason of its general or public importance ought to be submitted to the Court of Appeal for decision: s 144 Summary Proceedings Act 1957. That question is formulated as being whether or not a wharenui constructed on a Mäori reservation, set apart as an urupā by Gazette notice pursuant to a recommendation of the Mäori Land Court under s 338 TTWM Act, is subject to the Building Act.

Background

[3] The relevant background is set out in my 26 March 2009 judgment as follows:

> [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.

[4] I dismissed the Gibbs' appeal on three discrete or alternative grounds: at [19]-[28]. First, the legislative intent underlying the TTWM Act and the MRR of promoting the concept of development and control of Mäori reservations by Mäori owners did not as a matter of statutory construction exempt those who control reservations from compliance with the provisions of the Building Act. Second, reg 8(b) MRR did not provide a specific exemption from the obligation to comply. Third, as a matter of fact, there was no evidence of the Gibbs' appointment as trustees of a reservation designated for the purpose of a meeting place.

Decision

[5] Ms Jolene Patuawa, who has not appeared for the Gibbs' previously, submits that the question formulated meets the statutory test of being of such general and public importance that it ought to be submitted to the Court of Appeal. She relies on an affidavit from Mr Te Huirangi Waikerepuru in support. He is eminently versed in tikanga Mäori. He expresses the opinion that concepts underlying burial rituals, the mourning process, the reconnection of relationships, and the physical and cultural relationship between the wharemate, the urupā or cemetery, and the whenua or land, give rise to issues which must be "clarified and resolved for the benefit of all Mäori and Päkehä throughout New Zealand and all those that wish to live here in peace". These issues are intertwined with the underlying issues of recognition of rangatiratanga and trustees' powers which Mr Waikerepuru says "are of central importance to Mäori".

[6] I do not, of course, question Mr Waikerepuru's opinions or his summary of the importance of wharemate and urupā to Mäori people generally. But, with respect, they are not directly relevant to a question of statutory interpretation: that is, whether or not the provisions of the TTWM Act and the MRR relating to Mäori reservation land are outside the reach of the Building Act. The principal ground for my conclusion to the contrary was that the Building Act is a statute of general application (as accepted by the Gibbs' counsel during argument on the appeal) and applied to a building being constructed on a Mäori reservation. In the interests of completeness, I record those passages of my judgment to this effect:

> [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.

[7] The Gibbs' must satisfy three statutory conditions: (1) a question of law must be involved; it is not enough, as Ms Patuawa appears to accept, to identify a question of law; (2) by reason of its general or public importance the question ought to be submitted to the Court of Appeal for decision; and (3) this Court must be of the opinion that it ought to be so submitted: s 144(2). As the Court of Appeal has observed, s 144 was not intended to provide a second tier of appeal in proceedings brought under the Summary Proceedings Act, and Parliament intended that the substantive decision of this Court should bring finality to the proceedings unless the High Court is of the opinion that leave ought to be granted: *R v Slater* [1997] 1 NZLR 211 (CA).

[8] In my judgment the Gibbs' application must fail for two reasons. First, it is not enough for an applicant to formulate a question. The apparent purpose of the statutory discretion to grant leave is that a Judge of this Court must act as a filter or gatekeeper to ensure that the Court of Appeal is not burdened with untenable appeals, consistent with the legislative intention of finality of appeal rights in this Court. Thus the question must cross the threshold of arguability. Otherwise, it is not strictly speaking a question at all. Ms Patuawa has not attempted to establish that the question formulated is arguable, whether by identifying an error or errors in my reasoning or on some other basis.

[9] Second, even if the Gibbs' had identified a question of law of general or public importance, I would decline to exercise my discretion for the separate reason that a favourable answer to the question would be of academic importance only. I also dismissed the Gibbs' appeal on this discrete factual ground:

> [26] … 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.

[10] Thus, even if the question of law was decided in the Gibbs' favour, their convictions would stand.

Result

[11] The Gibbs' application for an order granting leave to appeal my decision dated 26 March 2009 is dismissed.

[12] Costs must follow the event. The Gibbs' are ordered to pay costs to Council according to category 2B on or before 22 June 2009.

Rhys Harrison J