IN THE COURT OF APPEAL OF NEW ZEALAND

CA675/2016
[2017] NZCA 98

BETWEEN	PHILIP DEAN TAUEKI Applicant
AND	NEW ZEALAND POLICE Respondent

Hearing:	20 March 2017
Court:	French, Miller and Winkelmann JJ
Counsel:	Applicant in person with A Hunt as McKenzie friend F G Biggs for Respondent
Judgment:	30 March 2017 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The application for stay is declined.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] Mr Taueki was charged with trespass for, in his words, walking upon his own ancestral land — Horowhenua Block XI. In the District Court, Judge Moss dismissed the charge.[1] The police appealed the dismissal to the High Court on three questions of law, with Mr Taueki cross-appealing on one question of law. In December 2016, Ellis J quashed the decision dismissing the charge and remitted

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1 *Police v Taueki* [2016] NZDC 8014 at [16].

the proceeding to the District Court for retrial.[2] Mr Taueki now seeks leave to appeal the decision of Ellis J.

Background

[2] The land in question, Horowhenua Block XI, comprises the bed of Lake Horowhenua and much of the land surrounding it. It is owned by Lake Horowhenua Trust (the Trust) and is Māori freehold land. Mr Taueki is one of over 2,000 beneficiaries of the Trust and, as such, has a beneficial interest in the land. The Horowhenua Lake Act 1905 declared the lake to be a public reserve under the control of a domain board but preserved the rights of the Māori owners.[3]

[3] The land is now subject to the provisions of s 18 of the Reserves and Other Land Disposal Act 1956 (the ROLDA), which was enacted to give effect to various matters agreed upon between the Māori owners of the land and other interested parties.[4] Section 18(2) of the ROLDA acknowledges the interest of the beneficiaries of the Trust as follows:

> Notwithstanding anything to the contrary in any Act or rule of law, the bed of the lake, the islands therein, the dewatered area, and the strip of land 1 chain in width around the original margin of the lake ... are hereby declared to be and to have always been owned by the Maori owners, and the said lake, islands, dewatered area, and strip of land are hereby vested in the trustees appointed by Order of the Maori Land Court dated 8 August 1951 in trust for the said Maori owners.

[4] Subsection (4) nonetheless reserves to the public the "free right of access over and the use and enjoyment of, the chain and dewatered strips fronting the Muaupoko Park".

[5] The critical issue for the purposes of the trespass charge was s 18(5) of the ROLDA which declares the surface waters of Lake Horowhenua,

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2 *Police v Taueki* [2016] NZHC 3098 at [68].

3 Horowhenua Lake Act 1905, s 2.

4 See preamble to s 18 of the Reserves and Other Land Disposal Act 1956 which sets out the history of the land including the legislative history predating 1956.

Muaupoko Park, and the part of the one-chain strip and dewatered area between the park and the lake, to be a public domain under the Reserves and Domains Act 1953,[5] but further provides that Māori title to the domain land is not affected by the declaration. Section 18(5) continues:

> ... provided ... that the Maori owners shall at all times and from time to time have the free and unrestricted use of the lake and the [domain] ... and of their fishing rights over the lake and the Hokio Stream, but so as not to interfere with the reasonable rights of the public, as may be determined by the Domain Board constituted under this section, to use as a public domain the lake and the ... land ...

[6] Mr Taueki has a lengthy history of conflict with the Domain Board, local residents, the local Council and the Trust. These conflicts have on occasion resulted in criminal charges against Mr Taueki and also in other forms of litigation.[6] The circumstances which led to the present proceedings can be traced back to a notice served upon Mr Taueki by an employee of a security company in October 2015. The notice recorded that the Domain Board, as lawful occupier, had reasonable cause to suspect Mr Taueki was trespassing or was likely to trespass in the Rowing Club and Sailing Club buildings situated on Horowhenua Block XI. The notice warned Mr Taueki to stay out of the buildings and was signed by the security company employee as the "duly authorised agent" of the Domain Board.

[7] The police allege that on 11 November 2015 Mr Taueki entered the Rowing Club building and that, as a consequence, he was charged with trespass. This is the charge dismissed in the District Court.

High Court decision

[8] Ellis J addressed the four questions raised on appeal. The first was: "Was the District Court correct in law to hold that the Domain Board cannot issue a trespass notice because it is not an "occupier" for the purpose of s 4 of the Trespass Act

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5 We note that the Reserves and Domains Act 1953 was replaced by the Reserves Act 1977 but that this legislative shift did not affect the operation of s 18 of the Reserves and Other Land Disposal Act 1956. See also *Police v Taueki*, above n 2, at [17].

6 This history is more particularly detailed in *Police v Taueki*, above n 2, at [18]–[26].

1980?"[7] Ellis J answered that question "no". She noted the definition of "occupier" in s 2 of the Trespass Act 1980 as:

> in relation to any place or land, ... any person in lawful occupation of that place or land; and includes any employee or other person acting under the authority of any person in lawful occupation of that place or land

[9] The Judge held that for the purposes of the Trespass Act, "in lawful occupation" is appropriate to describe the status of a person who has the right for the time being to control the place or land, citing *Polly v Police* and *Police v Abbott*.[8] She said that the ROLDA allowed the Domain Board "to control the said domain" and to determine when the rights of the public were interfered with by the owners' right of access. As an administering body under the Reserves Act 1977, the Domain Board also had the power to make bylaws. Bylaws had been promulgated by the Domain Board which prohibited interference with the use or enjoyment of the Reserve by others and which empowered the Board to request people to leave. While noting that in the case of Māori owners, such a purported exercise of control might be amenable to challenge if not exercised in a manner demonstrably connected with ensuring that the "reasonable rights of the public" were not interfered with, such a challenge was not made in this case.

[10] Question two was as follows: "Was the District Court correct in law to hold that Mr Taueki could not be the subject of a valid trespass notice because of the rights reserved to the owners of the Horowhenua XI block under s 18 of the Reserves and Other Lands Disposal Act 1956?"[9] Ellis J again answered the question "no". She said that s 18 qualifies the owners' "free and unrestricted" use of the area.

[11] Question three was as follows: "Was the District Court correct in law to hold that the prosecution must be dismissed because there was no adequate evidence that the Domain Board had resolved to issue a trespass notice and no evidence that it had delegated the authority to trespass Mr Taueki to the person who served the notice on him?"[10] Ellis J answered the question "no".

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7 The relevant discussion begins at [39].

8 *Polly v Police* [1985] 1 NZLR 443 (CA); and *Police v Abbott* [2009] NZCA 451, [2009] NZAR 705.

9 The relevant discussion begins at [52] of *Police v Taueki*, above n 2.

10 The relevant discussion begins at [57].

[12] The fourth question was Mr Taueki's cross-appeal point: "Do my responses to the first three questions above effectively nullify the Treaty of Waitangi upon which the jurisdiction of this Court is founded?" Ellis J said the Court was required to interpret and apply the relevant statutes enacted by the legislature and the jurisdiction of the Court in civil or criminal matters is not derived from the Treaty.[11] Accordingly the answer to the question was "no".

Relevant principles

[13] Section 303 of the Criminal Procedure Act 2011 governs this application for leave for a second appeal. Pursuant to that section, this Court must not grant leave unless it is satisfied the second appeal raises a matter of general or public importance or that there has been a miscarriage of justice.

[14] Mr Taueki says that he wishes to pursue the following arguments on appeal:

(a) That the order made by Ellis J that the proceeding be remitted to the District Court for a retrial is in breach of the rule against double jeopardy. He says that s 151 of the Criminal Procedure Act regulates those cases where a retrial may be granted if the person has previously been acquitted. This proceeding does not meet that threshold.

(b) The decision of Ellis J overrides the guarantee given by the Queen in the Treaty of Waitangi, signed by Mr Taueki's ancestor Taueki and other paramount chiefs — that those persons who possess land collectively will continue to have its full and exclusive possession. Mr Taueki argues that, where there is ambiguity in a statute, the Treaty of Waitangi should be deployed as an interpretive aid. If that had been done in this case, the outcome would have been different. This is in essence a rehearsal of the arguments Mr Taueki made in support of his cross-appeal point, the fourth question.

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[11] At [65]–[66].

(c) That Ellis J's answers to the first three questions of law were otherwise wrong.

Discussion

Double jeopardy

[15] The effect of Ellis J's judgment is to quash the earlier acquittal. That being the case, no issue of double jeopardy arises and the thresholds set out in the Criminal Procedure Act for the ordering of a retrial of an acquitted person do not apply.[12] They only apply where the acquittal is still "in force" at law.

Treaty of Waitangi

[16] As Ellis J observed, the courts are required to interpret and apply relevant statutes enacted by the legislature.[13] Mr Taueki wishes to argue that the Treaty of Waitangi be used as an interpretive aid in the case of ambiguity in the relevant legislative provisions. But the difficulty for this argument is that the provisions which Ellis J was called upon to construe were plain in their terms. There was no ambiguity. Mr Taueki's fundamental concern appears to be that the legislative regime is not consistent with the Treaty of Waitangi or with tikanga Māori, but that is not an issue that he can pursue in this forum.

Did the Judge err in her answers to the other questions?

[17] In answering the first question, whether the Domain Board was an occupier for the purposes of the Trespass Act, the Judge applied settled authority as to the meaning of occupier for the purposes of that Act. Mr Taueki seeks to argue to the contrary in reliance upon *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* and *Moorgate Mercantile Co Ltd v Twitchings*.[14] Those cases are not on point. What was at issue in this case was whether the statutory regime gave sufficient rights to the Domain Board to qualify the Board as an occupier for the purposes of the

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12 Criminal Procedure Act 2011, ss 151–154.

13 *Police v Taueki*, above n 2, at [65].

14 *Bishopsgate Motor Finance Corp Ltd v Transport Brakes Ltd* [1949] 1 KB 322 (CA); and *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 (HL).

Trespass Act. The Judge held that it did. No argument Mr Taueki has outlined to us causes concern that the Judge has erred in her application of established principle.

[18] The second question is whether Mr Taueki, as an owner, could be the subject of a valid trespass notice. As we have already noted, the Judge's decision turned upon the application of unambiguous statutory provisions.

[19] The third question involved consideration of whether there was adequate evidence that the Domain Board resolved to issue a trespass notice and whether it could delegate authority to trespass Mr Taueki to the security company employee. We first observe that neither issue is of public or general importance but turns upon the particular facts of the case. The Judge reviewed the evidence in relation to the first issue carefully. She was satisfied there was sufficient oral evidence to prove that the Domain Board had made the necessary resolution, that the prosecutor offered to produce documentary evidence of this but that Judge Moss was content that it not be produced.[15] As to the issue of delegation, Ellis J was satisfied there was sufficient evidence that the delegation had occurred.[16] She noted that s 2(1) of the Trespass Act includes within the definition of occupier an agent of the occupier. These conclusions were unsurprising, given the evidence produced in the District Court and the extension of the definition of occupier to include the occupier's agents.[17]

[20] We conclude that none of the arguments Mr Taueki wishes to advance on appeal has any realistic prospect of success. In light of this, the proposed appeal cannot be said to raise matters of general or public importance and nor is there any appearance of a miscarriage of justice.

[21] The application for leave to appeal is declined.

[22] We also deal at this point with another application which was filed in this proceeding. On 17 January 2017, in the context of civil proceedings brought by the Trust against Mr Taueki, Clark J ordered Mr Taueki to obey the terms of an

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15 *Police v Taueki*, above n 2, at [59].
16 At [61]–[63].
17 Trespass Act 1980, s 2.

injunction earlier granted by the Māori Land Court requiring Mr Taueki to vacate the Trust land and buildings and declaring that the Trust was entitled to vacant possession.[18] Clark J also ordered that if Mr Taueki did not comply with the order by 10 March 2017, an order be issued on that date for his arrest.[19] On 20 February 2017 Mr Taueki filed an urgent application for stay of execution of the orders made by Clark J. As was pointed out by Randerson J in minutes of 23 February 2017 and 6 March 2017, any application for stay should have been filed in the High Court.[20] For these reasons we are satisfied that this Court has no jurisdiction to consider the application for stay and it is declined accordingly. We also note that the application for stay relates to a proceeding outside of the proposed appeal the subject of this application.

Result

[23] The applications for leave and for stay are declined.

Solicitors:
Crown Law Office, Wellington for Respondent

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18 *Horowhenua 11 (Lake) Part Reservation Trust v Taueki* [2017] NZHC 4.

19 At [13].

20 Subsequent to these minutes Mr Taueki filed an application for a stay in the High Court which was rejected by Clark J on 8 March 2017: *Horowhenua 11 (Lake) Part Reservation Trust v Taueki* [2017] NZHC 379 at [11]. The Registry has confirmed that Mr Taueki has now properly filed an appeal in this Court against Clark J's refusal to grant a stay. This appeal is the appropriate channel for Mr Taueki's grievance in this respect to be heard.