IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1937
[2018] NZHC 2636

BETWEEN	THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF AUCKLAND Plaintiff
AND	RETI BOYNTON First Defendant
	THE UNAUTHORISED OCCUPANTS OF THE PROPERTIES AT 120 COLLEGE ROAD AND 103 COLLEGE ROAD, NORTHCOTE Second Defendants

Hearing:	9 October 2018
Appearances:	B J Upton and S L Hawksworth for the plaintiff R Boynton in person L Peters in person
Judgment:	9 October 2018

JUDGMENT OF JAGOSE J

This judgment was delivered by me on 9 October 2019 at 4:45 p.m.
pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Parties:
Mr B J Upton and Ms S L Hawksworth, Simpson Grierson, Auckland
Mr R Boynton
Copy to:
Mr L Peters

[1] The Roman Catholic Bishop of the Diocese of Auckland owns two properties in Auckland's Northcote, formerly used by Hato Petera College for its school and boarding facilities.

[2] The defendants protest the Diocese's retention of the land despite recent closure of those facilities, which they say is contrary to the purposes for which the Diocese was granted the land. In demonstration of their protest, they have occupied parts of the land, while asserting rights to exclude others from it.

[3] Under his substantive claim for a declaration as to his rights in relation to the land, and for supplementary orders, the Bishop applies now for an interlocutory injunction requiring the defendants immediately to provide vacant possession of the land, and to remove any personal property they may have with them (or failing that, entitling the Bishop to remove such property). By 'interlocutory injunction' is meant an order to manage circumstances until the Court decides the Bishop's substantive claim. The Bishop has filed the mandatory undertaking as to damages, by which he undertakes to comply with any order for payment of damages to compensate the defendants for any loss suffered through the injunction.

[4] The first defendant, Reti Boynton, describes himself as spokesperson for the occupants (the second defendants), who he explained were the Peters and Turoa families, whose predecessors possessed the land before it was acquired by the Crown and granted to the Diocese. Mr Boynton sought an adjournment to obtain legal representation, on the same grounds as were refused by Lang J on 3 October 2018. Having failed on that application, Mr Boynton requires leave on grounds of special circumstances to bring a similar application.[1] No special circumstances were identified, and I refused leave.

[5] Lawrence Peters, one of the second defendants, disputed Mr Boynton's entitlement to represent at least his family, and sought an adjournment to clarify the occupants' representation before me. As the Bishop's application is for interlocutory

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1 HCR 7.52.

orders, not affecting the defendants' substantive rights, I refused to adjourn the hearing.

[6] The defendants have not filed any notice of opposition or submissions in accordance with timetable directions. Mr Boynton belatedly filed a document on letterhead titled "Hapu Tangata Whenua", and styled an "Affidavit to Cease and Desist", over seals of the hapu's purported "Kaitiaki", "U.N. Field Marshal", and "U.N. Federal Marshal". The document seeks to justify the defendants' occupation of the land on various inchoate grounds, including intellectual property, jurisdiction, Christian scripture, United States law, the New Zealand Bill of Rights, minority and indigenous rights, and various international conventions. Notably, the document rejects this Court's jurisdiction over the defendants, and asserts their entitlement to take "the matter into [their] own hands lawfully".

[7] However, in oral submissions, Mr Boynton acknowledged the defendants' occupation of part of the land. He acknowledged also his receipt of a trespass notice addressed to him, requiring him to stay off the land, with which he contended to have complied. He explained the defendants had claims to the land, which he proposed should be addressed to the Māori Land Court, together with the Bishop's application.

[8] Despite the procedural irregularities, I proceed to determine the application on its merits.[2]

Background

[9] The Bishop, in his official capacity, is the registered proprietor of the land at 103 and 120 College Road in Auckland's Northcote, described in certificates of title NA26B/813 and NA79C/253.

[10] The land was part of a grant in 1850 by Governor Hobson to Bishop Pompallier (the present Bishop's predecessor, at least so far as the Diocese of Auckland is part of Western Oceania, Bishop Pompallier's 'parish'). The Governor, who had purchased the land from Ngāti Paoa and related tribes, granted the land subject to a Deed of Grant

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2 *Mihinui v Attorney-General* [2017] NZHC 654 at [13].

dated 19 August 1850. The Deed states the land was to be "… for the education of children of our subjects of both races and of children of other poor and destitute persons being inhabitants of the islands in the Pacific Ocean …". Ngāti Paoa contends for an earlier agreement with the Crown "to set the land aside as a reserve for the purpose of providing education specifically to Maori".

[11] The affidavit evidence in support of the Bishop's application exhibits a letter on Ngāti Paoa letterhead dated 10 August 2018 to the Bishop, advising of its claims to the land, including under a Treaty of Waitangi claim on which Ngāti Paoa is currently in negotiations with the Crown. Gary Thompson, Chair of Ngāti Paoa Iwi Trust, has commented publicly the defendants represent only two families in, and not the entirety of, that iwi.

[12] However, regardless of those claims, the defendants' protest relates more to the recent closure of the school and boarding facilities on the land, which had provided a residential education service catering to Catholic Māori families. The Ministry of Education cancelled the boarding facility's license in September 2016, on the basis of concerns about the safety of the facilities and other staffing and governance issues. The college continued to operate as a day school only for a little while longer, but its roll continued to decline as families chose to send their children elsewhere. On 31 August 2018, the Ministry cancelled the agreement which allowed the college to operate as a state integrated school. The Diocese's counsel, Ben Upton, told me the Diocese intends still to use the properties for educational purposes, and is currently considering its options.

[13] The defendants took up occupation of the properties around mid-August 2018, and have remained since. They primarily reside in the hostel property, but occasionally have ventured onto the college property as well. As mentioned, the Bishop served a trespass notice on Mr Boynton on 7 September 2018, with which Mr Boynton says he has complied. Although Mr Upton suggested the evidence was otherwise, that may have been due to a confusion of dates, Mr Boyton saying he was served with the trespass notice on 20 August 2018, and Mr Upton pointing to evidence of his presence on 7 September 2018. If the trespass notice was not served until the latter date, there is nothing undermining Mr Boyton's assurance he has complied with it.

Legal principles

[14] Interlocutory injunction applications are determined on the basis of whether the plaintiff has a serious question for trial, and whether the balance of convenience and overall interests of justice favour granting the injunction.[3] On the latter consideration(s), the question is whether refusing the injunction would be harder on a plaintiff who was successful at trial, than would granting it be on an ultimately successful defendant.[4] This assessment is undertaken by reference to the adequacy of damages, preservation of the status quo, the uncompensable disadvantages to either party, and the relative strengths of their cases.[5]

[15] The Bishop accepts his application is seeking a mandatory injunction (requiring the defendants to do things), rather than a prohibitory injunction (requiring the defendants not to do things). Such relief is granted more rarely. As Thomas J writes, citing McGechan's commentary, a mandatory injunction ought to be granted on an interlocutory application:[6]

> … only in special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided immediately or where the injunction is directed at a simple and summary act, which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court has to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than is required for a prohibitory injunction: *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901 (CA).

Discussion

—a serious question for trial?

[16] I make no determination on any substantive claim the Bishop is in breach of the 1850 Deed of Grant, nor on the iwi's more general Treaty of Waitangi claim with respect to Governor Hobson's original purchase of the land. There may well be force

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3 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL); and *Klissers Farmhouse Bakeries Ltd* [1985] 2 NZLR 129 (CA).

4 *Wellington International Airport Ltd v Air New Zealand Ltd* HC Wellington CIV-2007-485-1756, 30 July 2008 at [4] citing *Kane v Global Natural Resources Plc* [1984] 1 All ER 225 (CA) at 237.

5 *Wellington International Airport Ltd v Air New Zealand*, above n 4, at [6]-[14].

6 *Precast NZ Ltd v Anystep Ltd* [2016] NZHC 377 at [44] citing Andrew Beck and other *McGechan on Procedure* (online ed, Brookers) at [HR7.53.23].

in these arguments, and their determination may have implications for the ownership and use of the properties.

[17] But that is not the issue presently before me. I am faced with a clear question of property rights. The Bishop is the registered proprietor of the land, and without the Bishop's permission for their occupancy, the defendants have no legal right to occupy the properties. (Conversely, given Mr Boynton's request for referral to the Māori Land Court, that Court lacks jurisdiction to entertain the Bishop's claim.) It follows there is clearly a serious question to be tried.

—balance of convenience/overall justice?

[18] I have a high degree of assurance, at trial of the Bishop's substantive claim, it will appear an interlocutory injunction was rightly granted.

[19] Blair Shanley, the Diocese's chief financial officer, deposes to various factors weighing in favour of interlocutory relief. So too does Linda McQuade, the Diocese's vicar for education. It is enough to note:

(a) there are safety concerns with the buildings on the properties, which are neither fit nor licensed for residence, and for which the Bishop as proprietor may be liable;

(b) the defendants appear to have damaged the buildings through their occupation (including by removing boards, breaking windows, cutting phone lines, and forcing entry into previously locked buildings);

(c) several complaints have been made the defendants intimidated people who entered or walked near the land, and have erected signs asserting their rights to exclude people from the land; and

(d) such conduct would affect other third parties with rights to use the land for various primarily school-age sports training and events.

[20] Were the Bishop to be held out of possession pending his success at trial (while remaining liable for the land and its facilities), damages would plainly afford an

inadequate remedy, even if such damages could sensibly be quantified. Conversely, damages would be an entirely adequate remedy to compensate the defendants for being ejected from their present occupation of the land, if they were successful in establishing the Bishop could not exercise proprietary rights over it.

[21] Maintenance of the status quo – the last settled position between the parties – also favours granting the application. The uncompensable disadvantages to the Bishop are legion, while compensation from the Crown is precisely what is sought by Ngāti Paoa (of which the defendants are a part, whether or not presently acting under its aegis). The occupation's impact on third parties with entitlements to use the land is a significant factor. And the strength of the Bishop's substantive case seems overwhelming, while the defendants' case is precisely to take matters into their own hands. In that last respect, their case seeks to "steal a march" on the Bishop, by rejecting the legitimacy of his landholding before that issue is determined substantively. Most significantly, the orders sought by the Bishop will not affect the defendants from pursuing any claims they may have.

[22] The overall justice of the case lies strongly in favour of granting the Bishop's application.

Terms of interlocutory relief

[23] Interlocutory relief (meaning, until the Court can determine the substantive claim) is typically granted "until further order of the Court". Mr Upton proposes the defendants' immediate provision of vacant possession of the land to the Bishop, and removal of any property they brought onto the land within two days of my judgment.

[24] In oral submission, anticipating the defendants' non-compliance, Mr Upton further proposed orders enabling the police, by force if necessary, to enforce any orders for vacant possession and removal of property. In answer to my query about my jurisdiction to direct the police to enforce orders obtained between parties to civil proceedings, Mr Upton noted police powers to enforce the Trespass Act 1980, and my broad powers to enforce interlocutory orders under HCR 7.48. Mr Upton emphasised such additional orders were desirable to avoid the Bishop needing to attend the Court again to address the defendants' continued unlawfulness.

[25] I see no foundation in either the Trespass Act 1980 or the High Court Rules for the sort of enforcement claimed by Mr Upton.

[26] The former enables a constable to arrest a trespasser without warrant if certain statutory precursors are met, but only then subject to the exercise of the constable's discretion.[7] I am not minded to risk overriding the precursors or discretion by any interlocutory order I may make here. The court's power under HCR 7.48 to "make any order that the Judge thinks just" in enforcement of an interlocutory order is expressly exercisable only "[i]f a party … fails to comply with an interlocutory order". I do not read this rule as permitting anticipatory exercises of its powers, and its express provision tends against reading such into the more generic HCR 7.44 (to "grant any interlocutory relief the Judge thinks just").

[27] But committing a trespass is criminal conduct, as may be disobedience of Court orders. Either or both may be punished by fines or imprisonment. I am satisfied the Bishop's interests are sufficiently addressed by his ability to seek an arrest order under HCR 17.84 on a party's non-compliance with any order I may make.

Result

[28] The Bishop's application is granted.

[29] Pending further order of this Court, I **order** the defendants:

(a) immediately to provide vacant possession of the land described in certificates of title NA26B/813 and NA79C/253; and

(b) within 48 hours of this judgment, to remove any property they brought onto the land.

[30] Pending further order of this Court, if any property not belonging to the Bishop remains on the land after 48 hours of this judgment, I **declare** the Bishop by his agents may remove the property to another place at which it is to be made available to its owner on proof of ownership.

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7 Trespass Act 1980, s 9(2).

[31] Finally, I **direct** any documents in the proceeding required to be served on the defendants may be served on Mr Boynton in his capacity as first defendant and (notwithstanding Mr Peters' complaint) as representative of the second defendants for the purpose of receiving those documents on their behalf, unless the second defendants otherwise accept such service.

Next steps

[32] To ensure expeditious resolution of this dispute, and to avoid the Court having to supervise its interim orders over any extended period, I refer the substantive proceeding to a Duty Judge List next week for timetabling orders leading to urgent hearing. First case management conference memoranda are due in advance of that call.

Costs

[33] In my preliminary view, as the successful party, the Bishop is entitled to 2B costs.

[34] If that is not accepted by either party, and costs cannot otherwise be agreed between them, costs are reserved for determination on short memoranda of no more than five pages to be filed and served by:

(a) the Bishop no later than ten working days after the date of this judgment;

(b) the defendants no later than five working days after service of the Bishop's memorandum; and

(c) the Bishop strictly in reply no later than five working days after service of the defendants' memorandum.

—Jagose J