IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 140/2023
[2024] NZSC 40

BETWEEN	PETER HOJSGAARD Applicant
AND	REGISTRAR-GENERAL OF LAND Respondent

Court:	Glazebrook, Ellen France and Miller JJ
Counsel:	P H Thorp for Applicant D J Watson and N B de Lautour for Respondent
Judgment:	24 April 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] The applicant, Peter Hojsgaard, has filed an application for leave to appeal from a decision of the Court of Appeal.[1] The Court dismissed his appeal from a decision of the High Court in which Toogood J refused to grant Mr Hojsgaard compensation under s 58 of the Land Transfer Act 2017.[2] Section 58(1) provides for payment of compensation for loss or damage arising from either:

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1 *Hojsgaard v Registrar-General of Land* [2023] NZCA 562 (French, Courtney and Mallon JJ) [CA compensation judgment].

2 *Hojsgaard v Registrar-General* [2021] NZHC 3233 (Toogood J) [HC compensation judgment].

(a) an error or a wrongful act or omission of the Registrar … ; or

(b) a failure or a malfunction of a system or facility used to keep the register under section 9.

[2] Section 9 directs the Registrar-General of Land (the Registrar) to keep and operate a register of land that is subject to the Land Transfer Act 2017.

Background

[3] Mr Hojsgaard owns land at Ōmāpere in Northland. The land abuts the edge of the Hokianga Harbour. The current proceedings had their genesis in an earlier challenge to the accuracy of a cadastral survey of neighbouring Māori freehold land. Mr Hojsgaard said the boundaries depicted in the survey did not accord with the location of a (now historic) stream Mr Hojsgaard argued used to run along the western boundary of his property. Mr Hojsgaard took the view this omission meant he could not market his land as a waterfront property.

[4] The survey which Mr Hojsgaard challenged was approved by the Chief Executive of Land Information New Zealand (LINZ) for integration into the cadastre under the Cadastral Survey Act 2002. Mr Hojsgaard brought judicial review proceedings against the Chief Executive of LINZ and the individual surveyor. Mr Hojsgaard was partially successful in the High Court[3] and ultimately successful in the Court of Appeal.[4] The Court of Appeal quashed the Chief Executive's approval of the survey and directed them to reconsider the correctness of the survey, taking into account all of the evidence by then available.

[5] As a result of the reconsideration, the survey was withdrawn. In its place there were two new cadastral surveys prepared by Mr Hojsgaard's surveyor. The historic stream bed was redefined in this survey in a manner satisfactory to Mr Hojsgaard.

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3 *Hojsgaard v Chief Executive of Land Information New Zealand* [2018] NZHC 750, [2018] 1 NZLR 99 (Jagose J).

4 *Hojsgaard v Chief Executive of Land Information New Zealand* [2019] NZCA 84, [2019] 2 NZLR 864 (French, Clifford and Gilbert JJ).

[6] The current proceedings for compensation were then initiated in the High Court.[5] Mr Hojsgaard sought to recover over $2.4 million in surveyors', consultants', and legal fees; court costs; and associated expenses incurred in the process of restoring the status of his land to that of a "waterfront" property.

[7] The factual narrative is set out in full in the Court of Appeal's judgment in the current proceedings.[6] For present purposes, the only aspect of that somewhat complicated narrative to which we need refer relates to the role of the Māori Land Court. The context to this aspect is provided by the Māori Freehold Land Registration Project (the Project) which commenced in 2004. The objective of the Project was to ensure all relevant orders within the Māori Land Court records were submitted to the Registrar to ensure that the land title register and Māori Land Court records were aligned.

[8] We need not go into the detail of the process followed in relation to the relevant parts of the Omapere Block[7] as part of this Project. It is sufficient to note that in May 2010 the Māori Land Court presented three documents to the Registrar for registration, namely, a copy of the 1900 partition order for Omapere B; a copy of the consolidated order; and a copy of the status order. All three orders were certified by the Māori Land Court as correct copies.

[9] The relevant document here is the partition order. It included a sketch plan of Omapere B with the wrong metric measurements, and did not depict any stream separating the Omapere Block from the relevant section of Mr Hojsgaard's land. On receipt of the documentation from the Māori Land Court, the Registrar actioned the request for registration. A qualified record of title was registered in June 2010.

[10] In this respect, the Registrar was acting consistently with ss 123 and 124 of Te Ture Whenua Māori Act 1993, both of which are found in pt 5 of that Act. Under s 123, every order subject to pt 5 was required to be registered under the Land Transfer Act 1952 and, for the purposes of registration, the Registrar of the

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5 HC compensation judgment, above n 2.

6 CA compensation judgment, above n 1, at [7]–[67].

7 Macrons are not used in the Māori Land Court records when referring to Omapere Block, Omapere A and Omapere B.

Māori Land Court had to transmit the orders to the Registrar. Pursuant to s 124, if such an order was presented for registration under the Land Transfer Act 1952 without the support of a sufficient survey plan, the Registrar was required to include the order in the provisional register as a separate folium. At the relevant time, as the Court of Appeal explained, "this was done by issuing what was called a "CIR" (a computer interest register) with a notation that the order had been embodied in the provisional register".[8]

The proposed appeal

[11] The applicant's argument is that the Court of Appeal was wrong not to treat the actions in issue as either errors of the Registrar under s 58(1)(a) of the Land Transfer Act 2017, or as system failures under s 58(1)(b). Amongst other matters, in terms of s 58(1)(a), the applicant focuses on the sketch plan and the placement of it in the land register. In terms of s 58(1)(b) the primary focus is on the cadastral survey data.

[12] In developing the submissions on these aspects, Mr Hojsgaard says the case raises three matters of general or public importance,[9] namely:

> (a) The powers and responsibilities of the Respondent and the relationship between the Respondent and the [Māori Land Court];
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> (b) The correct scope of section 58 of the Land Transfer Act 2017, which has not been judicially considered previously, and the extent of the compensation right fundamental to New Zealand's land registration system;
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> (c) The extent of an affected property owner's right to correct the land register and be compensated for the cost of doing so.

[13] The third of these matters is encompassed by the first and second issues. Consideration of these issues would involve this Court reprising the arguments made on them in the Court of Appeal.

[14] In terms of the relationship between the respondent and the Māori Land Court, and the scope of s 58(1)(a), the Court of Appeal considered that s 124 of Te Ture

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8 CA compensation judgment, above n 1, at [28] (footnotes omitted).
9 Senior Courts Act 2016, s 74(2)(a).

Whenua Māori Act precluded any basis for compensation under s 58(1)(a). The Registrar's act of registering a partition order creating Omapere B and issuing a provisional title were actions carried out in execution of the Registrar's duties, which fell generally within the scope of s 58(1). But, as the Registrar was acting in accordance with statutory obligations under s 124(1) of Te Ture Whenua Māori Act to provisionally register the partition order, the Court said there could not have been any qualifying error.

[15] We do not see this aspect of the proposed appeal as giving rise to a question of general or public importance. The Court of Appeal accepted as appropriate the concession made on behalf of the Registrar that s 124 did permit the Registrar some discretion where errors were "fundamental and glaringly obvious".[10] However, the Court did not consider that any errors in the sketch plan were in this category. Further, the Court said:[11]

> … Ultimately, it is a question of degree which must be assessed against the background of a legislative scheme that anticipates the existence of inaccuracies including, in particular, inaccuracies and uncertainties around boundaries and the area of parcels. That is the very reason a fully guaranteed title is not required, or permitted, in circumstances where s 124 of Te Ture Whenua Māori Act applies. Provisionally registered orders were intended to be subject to correction by a survey to be undertaken by a qualified surveyor.
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> [98] The sketch plan in this case was expressly labelled "Sketch Plan Only". And the title that was issued was expressly issued on the basis that insufficient information existed to establish the location of the boundaries.

[16] Finally, the Court accepted there was one, mathematical, error apparent on the face of the partition order.[12] The Court also said it was notable that other errors in the sketch plan identified by the applicant "were not obvious to qualified surveyors" and, indeed, "required detailed survey work and research to uncover".[13] Investigation of matters of this nature was not something the legislation envisaged the Registrar would undertake. The Court concluded that the key choice for the Registrar "was whether

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10 CA compensation judgment, above n 1, at [97].
11 At [97]–[98].
12 This was in the form of a handwritten conversion on the first page of the imperial measurement for Omapere B's land area into hectares.
13 CA compensation judgment, above n 1, at [100].

the order was supported by a sufficient plan defining the affected land" and that he was correct to conclude it was not, which meant that s 124 applied.[14]

[17] We see the assessment of the Court of Appeal as to the scope of the Registrar's duties in this case and the applicability of s 124 as turning primarily on the particular facts of this case. Nothing raised by the applicant gives rise to any apparent error in that assessment.

[18] Turning then to s 58(1)(b), we note first that the respondent acknowledges the interpretation and scope of s 58 may raise a question of general and public importance. That acknowledgement appears particularly relevant to s 58(1)(b) which, as the Court of Appeal said, widened the scope for compensation beyond that of its predecessor, s 178(2) of the Land Transfer Act 1952.

[19] The Court of Appeal went on to say that this change in the statutory language did not mean that compensation could be extended beyond matters relating to the register of land. The Court took the view that if Parliament had intended to extend the scope of the compensation provisions in this significant way, it would have done so explicitly. Instead, the express reference to s 9 in s 58(1)(b) confirmed that s 58 is only concerned with the land title register. The Court saw the likely explanation for the reference to "system failure" as reflecting the move over time to managing the land register electronically, and that it was "likely intended to cover the situation where something went wrong in the automated process without there necessarily being any error on the part of the Registrar".[15]

[20] The Court concluded that the system failures Mr Hojsgaard relied upon were outside the scope of s 58(1)(b). They were not failures of the system used to maintain the register under s 9. Rather, they related to "the processes followed in assessing and approving cadastral survey data under the Cadastral Survey Act, and decisions about the storage of cadastral survey data and access to that data".[16]

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14 At [101].
15 At [88].
16 At [84].

[21] We see the prospects of success of the proposed appeal on this ground as insufficient to warrant a grant of leave where the claim would ultimately be to make the Registrar liable for a surveying error outside of the Registrar's purview. And, in any event, as the Court of Appeal noted, the applicant would still face the causation problems identified by that Court relating to the other requirements of s 58.[17]

[22] We add that, in all the circumstances, we see no appearance of a miscarriage of justice as that term is used in civil proceedings.[18] The criteria for leave to appeal are not met.

Result

[23] The application for leave to appeal is dismissed.

[24] The applicant must pay the respondent costs of $2,500.

Solicitors:
Glaister Ennor, Auckland for Applicant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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17 In brief, the Court considered there was no causal nexus between the errors and system failures relied on by the applicant because the effective causes of loss were ambiguities in one of the earlier surveys, which in turn caused a later surveying error. This is discussed in more detail in the CA compensation judgment, above n 1, at [108]–[111]. The Court also saw difficulties with some of the legal costs claimed, in that they were not reasonably incurred in terms of s 58: at [122].

18 Senior Courts Act, s 74(2)(b). See also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].