IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2022-488-000073
[2023] NZHC 1545

UNDER	The High Court Rules 2016
IN THE MATTER OF	An application under part 13 of the High Court Rules 2016 for recovery of land
BETWEEN	FAR NORTH DISTRICT COUNCIL Plaintiff
AND	THE UNLAWFUL OCCUPIERS OF LOCAL GOVERNMENT LAND AT WAITANGI Defendants

Hearing: 17 May 2023

Appearances: J G A Day for the Plaintiff
No appearance by or on behalf of The Defendants

Further submissions completed: 31 May 2023

Judgment: 21 June 2023

JUDGMENT OF POWELL J

This judgment was delivered by me on 21 June 2023 at 12.00 pm pursuant to R 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Law North Limited, KeriKeri

[1] Situated near Te Tii Marae at Waitangi between Te Kemara Avenue and Te Karuwha Parade is a recreation reserve (Lot 42 DP43842) and an accessway (Lot 41 DP43842). Both are vested and entrusted in the Far North District Council ("the Council"). Both the recreation reserve and the accessway are currently being occupied by persons unknown. The occupiers have erected various structures and created pathways over both properties and the ongoing occupation prevents the recreation reserve and the accessway from being used for their respective purposes. The Council therefore seeks the removal of the occupiers from both properties but to date have been unable to convince the occupiers to depart. The Police have indicated to the Council they will not support an eviction without a court order.

[2] As a result, the Council has applied pursuant to Part 13 of the High Court Rules 2016 for recovery of both the recreation reserve and accessway. This part of the High Court Rules gives jurisdiction to the Court to grant recovery of land where a person or persons are occupying land of the plaintiff "without… licence or consent" or are not otherwise tenants or subtenants.[1] Significantly, if the names of the unlawful occupiers are not known, r 13.3(2) provides that "the statement of claim need not name any person as defendant".

[3] The way in which Part 13 works was explained by Associate Judge D I Gendall (as he then was) in *Palmerston North City Council v Birch:*[2]

> The starting point for the Court on the present summary judgment application and in Part 13 High Court Rules proceedings generally, is that a registered proprietor is entitled to exclude all other persons from their land – *Kelly v Green* HC, Tauranga, CIV-2009-470-426, 27 January 2010 at [4]. The plaintiff here as registered proprietor of the property has a prima facie right to the possession order it seeks.
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> And often in cases such as *Bilbie Dymock Corp v Patel* (1987) 1 PRNZ 84(CA) the Court takes a robust approach where the plaintiff has full legal title to the property and the defendants, accordingly, have no interest in the property. In my view, the present case is also one which requires that a robust approach is adopted.

[4] Although judgment by default is not available for proceedings brought under Part 13, in this case notwithstanding the proceedings have been properly served the

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1 High Court Rules 2016 r 13.1(a).

2 *Palmerston North City Council v Birch* [2012] NZHC 2979, at [26]–[27].

defendants have taken no steps in response, and as a result the hearing has proceeded by way of formal proof.

Discussion

[5] The title and history of both lots was researched by George Swanepoel, the in-house counsel for the Council, who provided an affidavit summarising the history and annexing of both the recreation reserve and accessway. The affidavit details the documents recording the creation and vesting of the two lots.

[6] It appears from this material that both lots were created in the mid-1950s following the subdivision of Part Te Ti B Block. The subdivision encompassed land on both sides of Te Kemara Avenue as well as the landward side of Te Karuwha Parade, and four lots on the Paiha Blackbridge Road (now Puketona Road). In accordance with the subdivision plan, Deposited Plan (DP) 43842, numerous residential lots were created and land was also set aside as a National Māori Reserve to house Te Tii Waitangi Marae, as were the recreation reserve and the accessway.

[7] The New Zealand Gazette of 27 March 1958 recorded that the recreation reserve was from 10 October 1957 vested in the Crown pursuant to s 13 of the Land Subdivision in Counties Act 1946 ("the 1946 Act"). The recreation reserve remained in Crown ownership until the enactment of the Counties Amendment Act 1961 ("the 1961 Act") in December 1961. Section 44 of the 1961 Act confirmed that all public reserves vested in the Crown pursuant to s 13 of the 1946 Act were now vested in the relevant local authority which in the case of the recreation reserve was the Bay of Islands County Council. No certificate of title was created at the time of the vesting or subsequently.[3]

[8] In contrast the accessway, which like the recreation reserve is shown on DP 43842 was created pursuant to s 10(1) of the 1946 Act which provided "for the laying-

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[3] It is noted that s 44 of the 1961 Act contained a proviso which provided that the provision did not apply to public reserves that at the date of the commencement of the 1961 Act were domain or scenic reserves or under the control of an administering body under the provisions of the Reserves and Domains Act 1953 other than the County Council or the Road Board. The proviso clearly did not apply in this case as Lot 42 was a recreation reserve. The effect of this provision is that the Bay of Islands County Council took ownership of the recreational reserve from 1 April 1962, (Counties Amendment Act 1961, s 19), notwithstanding no certificate of title was issued.

out of access-ways complying with the provisions of this section for the purpose of providing more direct access for foot-passengers between any roads… or other places whatsoever to which the public are entitled to have access". In this case the accessway provided access for members of the public from Te Kemara Avenue to Te Karuwha Parade and the beach located on the other side of that road. Pursuant to s 10(6) of the same Act, "control and management of access-ways created under [s 10(1) were] vest[ed] in the local authority", again being the Bay of Islands County Council which was given the power to maintain and repair the accessway. As s 13 of the 1946 Act did not apply the accessway was never vested in the Crown nor consequently revested in the local authority in the same manner as the recreation reserve.

[9] The Far North District Council was formed in 1989. In accordance with the Local Government (Northland Region) Reorganisation Order 1989 it acquired the assets and interests of the Bay of Islands County Council, including the recreation reserve and accessway that are the subject of these proceedings.

[10] Current management of the recreation reserve is pursuant to s 16(6) of the Reserves Act 1977 which confirms that "every existing reserve shall be held and administered for the purpose of its existing reservation, and the administering body shall continue to control and manage the reserve under the appropriate provisions of this Act", unless reclassified under s 16(1) of the Reserves Act which has not occurred in relation to the recreation reserve.

[11] In contrast the accessway is subject to the Local Government Act 1974. Part 21 of that Act defines an "access way" as "any passage way, laid out… for the purposes of providing the public with a convenient route for pedestrians from any road… to any public place", effectively mirroring the terms of s 10(1) of the 1946 Act. Section 315 defines "road" as including an "access way". Section 316 confirms that all roads, and all soil thereof, shall "vest in fee simple in the council of the district in which they are situated", while s 317 confirms that all roads in that district come under the control of the council of the district,[4] which, as noted, since 1989 has been the Far North District Council.

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[4] In his submissions Mr Day indicated it could also be argued that the accessway could be administered as a local purpose reserve pursuant to ss 16(11)(b) and 23 of the Reserves Act 1977.

[12] Overall, the evidence is clear that the Council is the owner and manager of both the recreation reserve and the accessway. It is equally clear from the evidence the occupiers have no permission, consent, or licence to be there and have ignored trespass notices served on them. Unlike other types of land, and as Mr Day accepts, with regard to both the recreation reserve and the accessway the public, including the occupiers, have the right of freedom of entry and access. This does not give members of the public or any other third party the right to remain on the land continuously, still less to construct structures, create roads and/or pathways, or to pitch tents. Such occupation means that the public cannot utilise the recreation reserve in accordance with the Reserves Act 1997. As a result I am satisfied it is appropriate to grant the Council's application in terms of the statement of claim.

Decision

[13] For the reasons set out above I make the following orders:

(a) An order granting the Far North District Council possession of Lot 42 DP 43842 and Lot 41 DP 43842;

(b) An order requiring all persons in occupation of Lot 42 DP 43842 and Lot 41 DP 43842 to quit those lands and yield vacant possession to the Far North District Council, within three working days of these orders issuing;

(c) An order that all persons in occupation of Lot 42 43842 and Lot 41 DP 43842 remove all possessions and structures and other improvements from those lands, within three working days of these orders' issuing.

(d) An order that the Far North District Council is entitled to remove any persons, or any possessions or structures or other improvements, that remain on Lot 42 DP 43842 and Lot 41 DP 43842 at the expiration of the date to comply with those orders; and

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For those sections to have applied however, the accessway would have needed to have been created by the 1961 Act which it was not, the accessway having been created by the 1946 Act.

(e) Leave is reserved for the Far North District Council to apply for any consequential orders necessary to give effect to orders (a)–(d) above.

[14] The Council sought costs on the application and, as it has succeeded, would normally be entitled to costs. There are procedural difficulties with any costs award given that there are no named defendants. In the circumstances, should the Council seek costs on the application it is to file a memorandum by 12 July 2023 setting out its position including detailing against whom costs are sought and on what basis, as well as the amounts sought. I will then consider the application and make such directions and/or determinations as are appropriate.

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Powell J