IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2011-443-529

BETWEEN	RUSSELL VICTOR GIBBS, PARANUI JOSEPHINE GIBBS AND LEIGH HORTON Appellants
AND	NEW PLYMOUTH DISTRICT COUNCIL Respondent

Hearing: 12 December 2011

Appearances: Appellants in person
S Hughes QC for the Respondent

Judgment: 20 December 2011 at 12:00 PM

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 20 December 2011 at 12:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

……

Parties / Counsel / Solicitors:
Appellants
Ms S Hughes QC, Barrister, New Plymouth
C and M Legal, Office of the Crown Solicitor, New Plymouth

[1] The appellants, as trustees, own land at Tongaporutu, North Taranaki. Mr and Mrs Gibbs live on the land. Part of the land abuts Clifton Road.

[2] The Council wishes to acquire four to five hectares of the land for realignment of Clifton Road where the road has subsided. The Council advised the appellants that a surveyor would be going on to their land pursuant to s 110 of the Public Works Act 1981 (the Act) to carry out a survey.

[3] The appellants issued a trespass notice to the Council. The Council applied to the District Court for an injunction to restrain the appellants from interfering with persons entering the property pursuant to s 110.[1] The Council also sought a declaration that the Council's surveyor was entitled to enter the appellants' property to complete a survey for the purposes of the Act. An injunction was granted and a declaration made broadly as sought.[2]

The factual background

[4] An outline of the factual background is conveniently taken from the judgment under appeal. This is not affected by the challenge on appeal to various findings of fact:

> [2] The road in question, Clifton Road, runs from Tongaporutu in North Taranaki south to the coast over a distance of about six kilometres. It was part of the main road north until the construction of the present highway over Mt Messenger in the late 19th century. Until 1960 it was used as a stock route for moving sheep and cattle from farms north of Mt Messenger to the Waitara freezing works. One of its distinctive features is the Te Horo tunnel through the seafront cliffs down to the beach. Under the name Whitecliffs Walkway, it has been declared a walkway under the New Zealand Walkways Act 1990.
>
> [3] Clifton Road has always been and remains a dedicated legal road. For the most part, the land over which it passes is in public ownership. The defendants own and farm much of the adjoining land. The Gibbs family first purchased the land in 1899, about 20 years after the road was built and dedicated. It follows that the road, even from the outset, was never part of

[1] An injunction was also sought to prevent interference with steps taken to value the property, but that application was not pursued in the District Court and is not relevant on the appeal.
[2] *New Plymouth District Council v Gibbs and Ors* DC New Plymouth, CIV-2010-043-432, 31 August 2011, Judge T J Broadmore.

> the family land. I add that the defendants' land is general not Maori land although the Gibbs family is of Maori descent.
>
> [4] There are problems with the road. The tunnel is falling into disrepair and requires urgent attention both for safety reasons and for its future preservation. Public funds are available to refurbish the tunnel. The only way of gaining access for repairs is along Clifton Road. But in one or two places the road now deviates from the dedicated road reserve so as to avoid subsidence and erosion of the seaward cliff face. It therefore intrudes in part into land owned by the defendants. They have declined to allow access for the Council over their land to allow the repair of the tunnel, and have reinforced their position by the issue of trespass notices.
>
> [5] The Council therefore wishes to acquire from the defendants the land necessary both to legalise the present route of the road and to enable some minor alterations to that route so that eroded areas can be bypassed. That part of the road reserve no longer required would be transferred to the defendants or other adjoining owners as appropriate. The land required amounts in total to between four and five hectares. It is necessary for surveyors to conduct a survey for the purpose of defining accurately the boundaries of the land required. The Council therefore served on the defendants a notice under s 110 of the Public Works Act 1981 notifying them that it had authorised surveyors to enter on the land to conduct the necessary survey. The defendants have nevertheless continued to decline access.
>
> …
>
> [8] The Council initially applied for an interim injunction in the same terms. But that application was declined by the Chief District Court Judge, Judge Johnson, in a judgment dated 22 October 2010. The Chief Judge held that there was an arguable case that the Council should have invoked s 111 of the Act rather than s 110, because of the presence on the land of waahi tapu; and that it was inappropriate to grant an interim injunction when to do so would in effect determine the substantive issue between the parties.

[5] The appellants' concerns in respect of waahi tapu were summarised by the Judge as follows:

> [18] The defendants maintain that this is not an ordinary situation. Their reasons include concerns that waahi tapu on the land will be threatened by any process the Council might undertake, that the mana whenua of Nga Hapu O Poutama (Poutama), the inhabitants of the land from time immemorial, will thereby be jeopardised or infringed; and that their own status as kaitiaki of the land will similarly be jeopardised or infringed. (Mr White, Rangitira of Poutama, a deponent whose affidavit was tendered on behalf of the defendants, asserts that the Gibbs family is tangata whenua according to the culture and traditions of Poutama. As to that, see [58] below.)

At [58] the Judge included reference to a Waitangi Tribunal report stating that Poutama hold mana whenua in the area in question.

Provisions of the Act

[6] The sections of the Act of most direct relevance on this appeal are ss 110 and 111. The material parts of these sections are as follows:

> **110 Powers of entry for certain survey purposes**
>
> (1) Subject to subsections (2) to (4) of this section, any person authorised either specifically or generally by the Minister or local authority, as the case may require, may, for the purposes of carrying out any public work or any proposed public work, and subject to the limitations of any authorisation so granted, enter and re-enter any land at reasonable times, with or without such assistance, aircraft, boats, vehicles, appliances, machinery, and equipment as are reasonably necessary for making any survey in accordance with survey regulations made under the Cadastral Survey Act 2002 [previously the Survey Act 1986].
>
> (2) Before exercising any of the powers conferred by subsection (1) of this section, the Minister or local authority shall, where practicable, give reasonable notice to the owner or occupier of the land, as the case may require, of the intention to exercise those powers.
>
> …
>
> **111 Powers of entry for other survey and investigation purposes**
>
> (1) Subject to subsections (2) to (5) of this section, any person authorised either specifically or generally by the Minister or local authority, as the case may require, may, for the purposes of carrying out any public work or any proposed public work, and subject to the limitations of any authorisation so granted—
>
> (a) Enter and re-enter any land at reasonable times, with or without such assistants, aircraft, boats, vehicles, appliances, machinery, and equipment as are reasonably necessary for making any kind of survey or investigation:
>
> (b) Dig and bore into the land and remove samples of it:
>
> (c) Erect temporary buildings on the land:
>
> (d) Set out the lines of any works on the land.
>
> (2) Unless the owner and occupier of the land otherwise agree, the powers conferred by subsection (1) of this section shall not be exercised unless the owner and occupier of the land affected have been given 10 working days' notice in writing of—
>
> (a) How and when entry is to be made; and
>
> (b) The specific powers intended to be exercised; and

(c) A statement of the owner's or occupier's rights under subsection (4) of this section; and

(d) A statement that the owner or occupier may be entitled to compensation under this Act.

…

(4) The owner or occupier may, within 10 working days after receiving the notice and after giving notice to the Minister or local authority, as the case may be, of his intention to do so, object to the District Court nearest to the land concerned, and the Court may summon the Minister or local authority, or his or its representative, to appear before the Court at a time and place named in the summons.

(5) If it appears to the Court that the proposed survey or investigation is unreasonable or unnecessary the Court may—

(a) Order that the survey or investigation shall not be undertaken, or shall not be undertaken in the manner proposed; or

(b) Direct that the survey or investigation be undertaken in such manner and subject to such limitations and restrictions as the Court thinks fit—

and all persons concerned shall be bound by any such order.

[7] Also of some relevance are parts of ss 18 and 23, as follows:

18 Prior negotiations required for acquisition of land for essential works

(1) Where any land is required for any public work the Minister or local authority, as the case may be, shall, before proceeding to take the land under this Act—

(a) Serve notice of his or its desire to acquire the land on every person having a registered interest in the land; and

(b) Lodge a notice of desire to acquire the land with the District Land Registrar who shall register it, without fee, against the certificate of title affected; and

(c) Invite the owner to sell the land to him or it, and, following a valuation carried out by a registered valuer, advise the owner of the estimated amount of compensation to which he would be entitled under this Act or the betterment that he may be liable to pay; and

(d) Make every endeavour to negotiate in good faith with the owner in an attempt to reach an agreement for the acquisition of the land.

(2) If, after a period of 3 months,—

(a) The owner fails to respond to any invitation issued under subsection (1) of this section; or

(b) The owner refuses to negotiate with the Minister or the local authority, as the case may be; or

(c) An agreement for the sale and purchase of the land is not made with the owner under section 17 of this Act,—

the Minister or local authority may, within 1 year after notifying the owner under subsection (1) of this section, proceed to take the land under this Act.

…

23 Notice of intention to take land

(1) When land… is required to be taken for any public work … the local authority in the case of a local work, shall—

(a) Cause a survey to be made and a plan to be prepared, and lodged with the Chief Surveyor, showing the land required to be taken and the names of the owners of the land so far as they can be ascertained; and

…

(c) Serve a notice on the owner of, and persons with a registered interest in, the land of the intention to take the land in the form set out in Schedule 1 to this Act.

…

(3) Every person having any estate or interest in the land intended to be taken may object to the taking of the land to the Environment Court in accordance with the provisions of the notice.

…

The District Court judgment

[8] There was a hearing over two days on 30 and 31 August 2011. There were four witnesses. Evidence was given for the Council by a Council officer who, amongst other things, set out the Council's objectives in relation to Clifton Road and dealings with the appellants in that regard. There was evidence for the Council from the surveyor who had been authorised by the Council to undertake the survey. The surveyor, Mr Jackson, is licensed to undertake cadastral surveys. There was evidence from Mr Gibbs, including detailed evidence of the historical background,

the appellants' dealings with the Council, their willingness to co-operate in respect of matters relating to the Te Horo tunnel, and to the broad effect that compulsory acquisition of their land for the Council's stated purpose was unnecessary. There was further evidence relating to waahi tapu and questions of mana whenua. Evidence was also given for the defendants by Mr White, a rangitira of Nga Hapu O Poutama, dealing with, amongst other things, questions of waahi tapu and the mana whenua of Poutama.

Is s 110 limited to the process of compulsory acquisition?

[9] The first issue considered by Judge Broadmore was whether the power to appoint surveyors under s 110 is limited to situations in which the Council has embarked upon a process to acquire land compulsorily. The Judge considered the provisions of s 110, on their own terms, and having regard to ss 18 and 23 of the Act. He concluded that the Council was entitled to invoke s 110 "whether or not it had embarked on a process of compulsory acquisition".

Is s 111 the applicable provision?

[10] The second issue was whether the Council should have invoked s 111, rather than s 110. The appellants contended that s 111 is the appropriate provision. They had advice from a solicitor to that effect and this led to their issuing the trespass notice. The appellants were concerned about the extent of the work that would be carried out and the impact of this on waahi tapu.

[11] The Judge held that the appropriate provision is s 110. Firstly, he agreed with the Chief District Court Judge who said, when dealing with the application for the interim injunction:

> The mere fact some soil may be disturbed is not enough to take the intended survey outside the scope anticipated by s 110.

The Judge considered, in particular, the evidence from the surveyor and said:

> [48] In those circumstances, I consider that the disturbance of the soil required for completion of a survey in terms of the Cadastral Survey Act and

> regulations is minimal; and I am further satisfied from Mr Jackson's evidence that the survey he proposes to undertake on the defendants' land will conform to those requirements. Just because the word "*dig*" appears in s 111, it does not follow that digging is not within the scope of s 110: if digging is required in order to conform to the regulations then it is within that scope. Subject to the issues concerning waahi tapu, therefore, I consider that there are no grounds to suggest that the Council should have commissioned a survey under s 111.

[12] The Judge concluded:

> [49] I finally draw attention to the headnote of s 111, "*Powers of entry for other survey or investigation purposes*". These words indicate that the surveys and investigations contemplated by the section are surveys of a different kind from surveys carried out in accordance with the Cadastral Survey Act 2002. As a matter of statutory interpretation, therefore, once it has been established that a cadastral survey is what is required and what is to be undertaken, there is no room for an argument that the survey should proceed under s 111.

Waahi tapu issues

[13] The Judge identified two main concerns of the appellants under this heading. He noted, firstly, that the appellants "are concerned that the surveyors will unwittingly interfere with the waahi tapu because they may be unaware of the existence of waahi tapu in the way of their work until it is too late". He said:

> [51] As to the first concern, the fact is that a number of waahi tapu are shown on published maps of the area. It is also the case that much of the area the Council wishes to acquire has been subject to scrutiny in recent years in connection with the laying of the closely adjacent Kapuni and Maui gas pipelines; and has been farmed for more than a century. There have therefore been greater opportunities than in many areas for the discovery of waahi tapu. Further, in another context, Mr Gibbs and Mr Haumoana White, whose family connections with the land in question go back many generations, have pointed out to Mr Jackson other sites in the area (none of which would be threatened by the work the Council proposes to do), and have also corrected information as to the location of some waahi tapu indicated on the maps. Finally, Mr Jackson explained in evidence that he had long experience of surveying in the Taranaki area and was well accustomed to recognising the physical manifestations of possible waahi tapu and dealing with them appropriately – granted that, as he readily accepted, he had little knowledge of their spiritual and cultural significance.

[14] The Judge referred to evidence from the surveyor of protocols the surveyor's firm had adopted for dealing with archaeological artefacts, including waahi tapu. The Judge referred to s 99(1) of the Historic Places Act 1993, which creates an

offence for destroying or doing other things to archaeological sites. The Judge concluded:

> [54] As a result of these considerations, I am satisfied that Mr Jackson and his employees would, if given access to the land, avoid interference with any waahi tapu, the existence of which was known to them, and that they would recognise and appropriately deal with any previously unknown waahi tapu which they might come across in the course of the work. In the light of his personal awareness of the sensitivities involved, the requirements of the Council, and the penal provisions of the Historic Places Act, there is no reason to suppose that Mr Jackson or his employees would ignore and damage any waahi tapu upon which they came.

[15] The second principal concern of the appellants identified by the Judge was that the Council's protocols for dealing with waahi tapu do not recognise Poutama's claim to mana whenua over the land and the role of Mr and Mrs Gibbs as kaitiaki of that mana whenua. As indicated by the Judge's outline of the evidence, and confirmed by the submissions for Mr Gibbs on the appeal, there are fundamental differences between the Council and Poutama as to who has mana whenua over the land in question. The Judge concluded, in essence, that it was not necessary for him to determine the issue, nor was he in a position to do so.

Power to grant an injunction

[16] Section 112(2) of the Act makes it an offence to wilfully obstruct any authorised person exercising power under s 110 or s 111. Section 242(2) provides for a fine not exceeding $500, and a further fine not exceeding $20 per day for a continuing offence.

[17] The Judge referred to the general rule that civil courts should not interfere by way of injunction to prevent the commission of a criminal offence.[3] He noted that there are exceptions to the general rule, and he referred in particular to *Attorney-General v Pickering*.[4] He concluded that, "in the unusual circumstances of this case", as he put it, the existence of the criminal offence did not prevent his granting an injunction if he was otherwise satisfied that an injunction was warranted. I will

[3] He referred to the statement in the first edition of *Civil Remedies in New Zealand* at para 4.4.4, page 244. Now see Rt Hon Sir Peter Blanchard and others *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at 266.
[4] *Attorney-General v Pickering* (1998) 16 CRNZ 46.

discuss the Judge's reasons more fully when considering this issue below. The Judge concluded that, in the exercise of his overall discretion, an injunction should be granted.

Jurisdiction to issue a declaration

[18] The District Court has no independent jurisdiction to issue a declaration under the Declaratory Judgments Act 1908. The Judge concluded, however, that he did have jurisdiction to make a declaration ancillary to an injunction, referring to authority to that effect. He accordingly made the declaration earlier noted as part of the injunctive relief.

Issues on the appeal

[19] Mr Gibbs represented the appellants on this appeal, as he had represented them as defendants in the District Court. He presented written submissions which set out with clarity the grounds on which the decision was challenged. He submitted that there were a substantial number of errors of fact and of law. For reasons I come to in a moment, it is unnecessary to discuss all the submissions. It is nevertheless appropriate to summarise the main issues raised in the written submissions:

(a) Does the decision have the effect of facilitating land being taken unnecessarily under the Act?

(b) Did the Judge err in finding that, in the circumstances, the Council was entitled to invoke s 110 rather than s 111 to conduct a survey?

(c) Did the Judge err in finding that the defendants' concerns for the protection of waahi tapu were not justified to the extent that s 110 should not be invoked according to its terms?

(d) Did the Judge err in finding that in the particular circumstances of the case, the existence of the criminal offence in the Act did not prevent him from granting an injunction?

(e) Was the Judge's decision to grant a declaration adequately supported by the facts?

[20] The appellants also submitted that there are factual inaccuracies in the District Court judgment on the question whether Poutama holds mana whenua in the area, including the appellant's land. The essence of the appellants' position in this regard was noted earlier, at [5], and aspects of matters dealt with by the Judge were noted at [15]. Mr Gibbs submitted that it is important to him and his wife, and to Poutama, to correct what he says are errors in the District Court judgment so as not to cause harm to the historical record for Poutama and their neighbour, Ngati Tama, and to ensure there is no mischief for their descendants.

[21] I acknowledge the significance of these issues for the appellants. I do not intend to diminish their significance by recording my agreement with the Judge's conclusion that "resolution of issues of mana whenua as between Poutama and other iwi is far beyond the jurisdiction" of the District Court in the matter before him. On this appeal it is also beyond the jurisdiction of the High Court. It would be wrong for this Court, on this appeal, to express any opinion on these matters because all parties who may be affected are not before the Court. And it is unnecessary to do so. For reasons I will come to, these issues are not relevant to the proceeding that was before the District Court or to the issues that arise on this appeal. However, for the avoidance of any uncertainty, I do record that the references in the District Court judgment to claims that may have been advanced in respect of mana whenua over the land in question do not constitute findings of fact, and therefore do not amount to conclusions binding on any person, hapu or iwi. And, as I have endeavoured to make clear, this Court expresses no view on these matters in this case.

[22] Mr Gibbs' oral submissions, like his written submissions, were presented with clarity. They were also presented in a concise way and with courtesy. This led to Mr Gibbs agreeing with me that, from the appellants' perspective, there are two central issues on the appeal. The first is whether the Council was entitled to proceed under s 110 of the Act rather than s 111. The second is whether the circumstances of this case, relating to the appellants' conduct, justify the grant of an injunction

notwithstanding the general rule that this civil remedy should not be granted because the Act provides criminal sanctions.

Is the Council entitled to proceed under s 110?

[23] I am satisfied that the Council was entitled to proceed under s 110 and that it remains entitled to proceed under s 110. The question is determined, in large measure, by straightforward statutory interpretation. This starts with consideration of s 110(1). It is not in issue that the Council has authorised surveyors to enter the appellants' land to undertake a survey and that this will be a survey "in accordance with survey regulations made under the Cadastral Survey Act 2002". In simple terms, as Mr Gibbs acknowledged, the intention is to undertake a cadastral survey, and this is plainly for Council purposes.

[24] The only material question that then arises is whether the survey Council wants to be done is "for the purposes of carrying out any public work or any proposed public work".[5] The evidence clearly establishes that the Council wanted the survey to be undertaken, and continues to want the survey to be undertaken, "for the purposes of carrying out … [a] proposed public work". This is established by notices served on the appellants with a letter dated 3 February 2010. Because of some of the arguments advanced for the appellants I will set out the content fairly fully.

[25] The letter of 3 February 2010 includes the following:

> As you are aware, [the] Council … wish [sic] to reopen Clifton Road to the public for vehicle access to the TeHoro [sic] Stock Tunnel.
>
> Attached by way of service is a Notice of Desire to acquire the land under Section 18 Public Works Act 1981. This is the first of three steps in the compulsory acquisition process. …
>
> Under Section 18 Public Works Act 1981 the Council is required to negotiate with you for a minimum period of three months before proceeding on to the next step. We will contact you in the very near future to commence those negotiations and try and finalise [sic] an agreement with you.

[5] Public Works Act 1981, s 110(1).

The letter then refers to s 23 of the Act and the appellants' right to object to the Environment Court. There is reference to an attached notice under s 110 of the Act, and the letter continues:

> This provides the statutory right to allow entry for the purposes of completing a survey of the land described in the Notice of Desire. … The survey is required to enable the Council to proceed with the compulsory acquisition if agreement cannot be reached.
>
> Having explained all of the steps please be assured we would prefer to see this acquisition resolved by way of negotiated agreement. …

[26] The Council's notice under s 18 of the Act includes the following:

> **Notice of Desire to Acquire Land Including Invitation to Sell and Advice of Valuation**
>
> Notice is hereby given pursuant to s 18(1)(a) of the Public Works Act 1981 that the … Council desires to acquire that part of your land described in the schedule to this notice for road [sic] (Clifton Road).
>
> Pursuant to Section 18(1)(c) of the Public Works Act 1981 I invite you to sell this land to the … Council. A registered valuer has carried out a valuation and the estimated amount of compensation to which you would be entitled is $100,000 plus GST, if any.
>
> …
>
> The … Council will make every endeavour to negotiate in good faith with you as the owner in an attempt to reach an agreement for the acquisition of the land.
>
> …
>
> Please note that the … Council may commence to acquire this land compulsorily if agreement cannot be reached within three months of the date of service of this notice.
>
> As this notice affects your property rights, I recommend that you seek legal advice if you have any doubts as to its effect.

[27] The Council's notice under s 110 includes the following:

> NOTICE AND ENTRY DETAILS
>
> Take notice that pursuant to Section 110 of the Public Works Act 1981, [the] Council (or it's [sic] authorised agents) intends to enter upon your property at Clifton Road … for the purpose of surveying those portions of your land which the … Council seeks to acquire pursuant to Section 18 Public Works Act 1981. The … Council has engaged and authorised Bland and Howarth Surveyors to enter upon your property for the purpose of carrying out the

> survey. The investigation will involve entry to the land at reasonable times during daylight hours with such staff and equipment as is reasonably necessary for making the survey.

The notice includes reference to timing and some other matters of a practical nature.

[28] The Council gave explicit notice to the appellants that the proposed entry on to the appellants' land was pursuant to s 110. There is no evidence establishing that it was for any other purpose. The appellants consulted their solicitors very promptly. Their solicitors wrote to the Council on 4 February 2010. They referred to the use of the word "investigation" in the s 110 notice.[6] They then said:

> My clients are very concerned at this statement as it appears that you intend to carry out an investigation under section 111 of the Act rather than a survey under section 110. By disguising this investigation under a section 110 notice you have denied my clients their statutory right to object to the entry (see section 111(4) of the Act).

[29] The focus on the word "investigation" takes the notice entirely out of context. The word is a reference to the survey and the notice as a whole makes abundantly clear that it is a survey under s 110. Section 110 provides a statutory constraint – it must be a survey "in accordance with survey regulations made under the Cadastral Survey Act 2002". If there was any doubt about this at the time, and I am not persuaded that there should have been, the doubt was removed by formal advice to the appellants' solicitors from Ms Hughes QC, on behalf of the Council, that the reason for entry was to undertake a survey in accordance with those regulations.

[30] There is no other statutory provision which requires a conclusion contrary to the one I have recorded to this point. Section 111 permits entry for a range of purposes. These include entry "for making any kind of survey or investigation": s 111(1)(a). Literally, "any kind of survey" would include a cadastral survey. And a Council wishing to have a cadastral survey made could choose to proceed under s 111. But reading s 111 in conjunction with s 110 makes clear that, if a cadastral survey is the only activity to be undertaken, then the Council may proceed under s 110. Any uncertainty in this regard is removed by the heading to s 111: "Powers of entry for *other* survey and investigation purposes" (emphasis added). "Other"

[6] In the sentence commencing "The investigation will involve entry to the land …" as reproduced at [27].

obviously means "other than a cadastral survey". This is the point made by Judge Broadmore at [49].[7] I agree with the Judge.

[31] What s 111(1)(a) also makes clear is that an "investigation", in statutory terms, is something different from a "survey". The Council did use the word "investigation" in its s 110 notice. It would have been better to use the word "survey". The Council in fact repeated the word "investigation" in a new s 110 notice, dated 4 June 2010. This was issued because the earlier notice had expired on its term. It is surprising that the word was used again, having regard to the intervening correspondence with the appellants' solicitors. However, this does not assist the appellants. The sense in which the Council used the word is clear from the context. It was not used in a statutory sense. It was a synonym for the cadastral survey that was to be undertaken under s 110.

[32] The appellants contended that s 111 should apply because of their concerns in relation to waahi tapu. In my judgment, this issue is to be determined as a matter of statutory interpretation. The Act does not require that it be determined by an assessment of the evidence on matters such as whether there may be areas of waahi tapu on the land in question and the extent of the physical activities involved in carrying out a cadastral survey. The Act contains its own carefully constructed guidelines directed to the nature and extent of the work that will be undertaken following entry on the land. This is seen in the clear distinction drawn between entry solely for the purposes of a cadastral survey, under s 110, and entry under s 111 for any other type of survey or for an "investigation". Section 111 then provides rights of objection for the land owner with review in the District Court.

[33] It is understandable that Judge Broadmore carefully reviewed the evidence relating to waahi tapu, the extent of the physical work involved in the cadastral survey (based on detailed evidence from the surveyor), and related matters. The questions in relation to waahi tapu are important. And in this case the Council's application for an interim injunction had been declined by the Chief District Court Judge on the grounds that there could be an arguable case for the appellants that the Council should have invoked s 111 because of the presence on the land of waahi

[7] Recorded above at [12].

tapu. However, I am satisfied that the issues are to be determined by interpretation, without a gloss being put on the statutory provisions. It is for Parliament to amend the Public Works Act if matters of the sort now being considered should require proceeding under s 111 rather than s 110.

[34] Mr Gibbs advanced further arguments in support of the primary submission that the Council is not entitled to proceed under s 110. He noted that s 23(1)(a) provides that, when land is required to be taken for any public work, the local authority may "cause a survey to be made and a plan to be prepared". The argument from this was that a s 110 survey could only occur once all of the provisions of s 18 had been complied with. This primary submission was supported with a submission of fact to the effect that, for the purposes of s 18, the Council does not need to undertake a cadastral survey.

[35] The point of statutory interpretation was considered by Judge Broadmore. He held that a s 110 survey was not limited to one required by s 23(1)(a). I agree. As the Judge said, this turns on the text of s 110 and it is clear: the survey can be undertaken for "any proposed public work" as well as "for the purposes of carrying out any public work".

[36] Mr Gibbs' submission of fact that a cadastral survey is not required at this stage, if borne out by the evidence, would not mean that the Council cannot proceed under s 110. It is for the Council to determine when it may wish to obtain a cadastral survey. Provided the statutory criteria of s 110 are met, it is not for a Court to determine whether or not there is any practical necessity for the Council's decision to proceed earlier rather than later. In addition, the evidence establishes that a cadastral survey of the land in question has not to date been carried out.

[37] One other matter that should be noted under this heading is the appellants' concern that the Council's proceeding under s 110 effectively pre-empts the appellants' rights under s 18. It is clear from the evidence that the appellants' rights under s 18 remain intact. Ms Hughes expressly acknowledged for the Council that the three month negotiation period under s 18 has not yet commenced. Most importantly, if matters cannot be resolved by negotiation and the Council is

determined to proceed, the appellants retain their right of objection to the Environment Court provided in s 23(3) of the Act. Numbers of concerns raised by the appellants in support of the appeal are not relevant in this proceeding. But the appellants' retain the right to have them addressed in the future.

Power to grant an injunction

Principles

[38] The general rule is that in the absence of a statutory power, a Court should not grant an injunction, a civil remedy, to prevent a defendant from doing something which, if done, would be a criminal offence. As the Judge noted, this is not an inflexible rule and "the Court retains a discretion in exceptional situations to grant an injunction despite the existence of the criminal law".[8]

[39] The principles which underpin the general rule must necessarily be borne in mind when considering whether the circumstances of a particular case justify an exception. There are a number of compelling reasons for the reluctance of civil courts to interfere in criminal matters. These are summarised in *Civil Remedies in New Zealand*[9] as follows:

(a) A recognition that the criminal courts have developed particular protections for a defendant, including stricter rules of evidence, the absence of a discovery obligation, trial by jury, and higher standards of proof. These protections may not necessarily be present if the matter is dealt with by a civil court.

(b) A recognition that it is ordinarily the obligation of the Attorney-General, or a person having a particular jurisdiction in respect of that offence, to enforce the criminal law. If an individual is concerned

[8] At [65].
[9] Rt Hon Sir Peter Blanchard and others *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) at 266.

with a failure of the Attorney-General or any other person to bring a prosecution, its remedy is to bring a private prosecution.

(c) The failure of the legislature to specifically provide for injunctive relief implies that such relief ought usually to be excluded.

(d) The enforcement of an injunction by way of imprisonment for contempt may create a more severe punishment for the offence than Parliament intended.

(e) The potential for duplication between the criminal courts and the civil courts, and the embarrassment that may result from contradictory findings.

[40] Circumstances which may justify departure from the general rule were discussed by the House of Lords in *Gouriet v Union of Post Office Workers.*[10] Lord Wilberforce introduced his discussion as follows:[11]

> This is the right, of comparatively modern use, of the Attorney-General to invoke the assistance of *civil courts* in aid of the *criminal law*. It is an exceptional power confined, in practice, to cases where an offence is frequently repeated in disregard of a, usually, inadequate penalty (see *Attorney-General (on the relation of Manchester Corpn) v Harris*[12]) or to cases of emergency (see *Attorney-General v Chaudry*[13]). It is one not without its difficulties and these may call for consideration in the future.

[41] In *Stafford Borough Council v Elkenford Ltd*[14] Bridge LJ said:

> We have been urged to say that the court will only exercise its discretion to restrain by injunction the commission of offences in breach of statutory prohibitions if the plaintiff authority has first shown that it has exhausted the possibility of restraining those breaches by the exercise of the statutory remedies. Ordinarily no doubt that is a very salutary approach to the question whether or not the court will grant an injunction in the exercise of its discretion, but it is not in my judgment an inflexible rule. The reason why it is ordinarily proper to ask whether the authority seeking the injunction has first exhausted the statutory remedies is because in the ordinary case it is

[10] *Gouriet v Union of Post Office Workers* [1978] AC 435; [1977] 3 All ER 70 (HL).
[11] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 481; [1977] 3 All ER 70 (HL) at 83.
[12] *Attorney General (on the relation of Manchester Corpn) v Harris* [1961] 1 QB 74; [1960] 3 All ER 207.
[13] *Attorney General v Chaudry* [1971] 1 WLR 1614; [1971] 3 All ER 938.
[14] *Stafford Borough Council v Elkenford Ltd* [1977] 1 WLR 324 at 330; [1977] 2 All ER 519 at 528.

> only because those remedies have been invoked and have proved inadequate that one can draw the inference, which is the essential foundation for the exercise of the court's discretion to grant an injunction, that the offender is … 'deliberately and flagrantly flouting the law'.

This passage was quoted with approval by Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd*.[15]

[42] In *Peek and Another v New South Wales Egg Corporation*,[16] Kirby P discussed the reasons for the general rule[17] before considering when there may be departure from the general rule. He suggested that it "is not particularly helpful to say that 'special' or 'exceptional' circumstances must be established" to depart from the general rule.[18] In support of that observation he cited the statement of Bridge LJ from the *Stafford Borough Council* case. He then said:

> This passage, and a number of other passages in earlier judgments illustrate, without exhausting them, the kind of circumstances in which injunctive relief will be offered, although criminal remedies remain unexhausted. Such circumstances include cases where:
>
> (a) The criminal penalty provided is not effective or is wholly ineffective in the circumstances to deter the unlawful conduct of the party whom it is sought to restrain, such that the conclusion is readily reached that prosecution and the processes of the criminal law will not deter that party from a continuing breach of the criminal law: see *Attorney-General v Sheffield Gas Consumers Co* (1853) 3 De G M & G 304 at 320-321; 43 ER 119 at 125, 126; cf Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 49, 50.
>
> (b) The party whom it is sought to restrain has evidenced a clear and unequivocal intention to continue to flout the criminal law: see Lord Templeman in *Stoke-on-Trent*, (at 776).
>
> (c) Unless the party in breach of the criminal law is stopped, there is a significant risk that widespread breaches of the law will be encouraged by others, resentful of the continuing activities of the party in breach or encouraged in that course by the example of such a breach: see Slade J in *Burnley Borough Council v England* (1977) 76 LGR 393; cf Lord Denning MR in *Stafford Borough Council v Elkenford Ltd* (at 329; 527).

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[15] *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754 at 776-777.
[16] *Peek and Another v New South Wales Egg Corporation* (1986) 6 NSWLR 1.
[17] At 3-4.
[18] At 4.

[43] The analysis of Kirby P of the reasons for the general rule, and circumstances where there may be exceptions, was adopted in full in this Court in *Land Transport Safety Authority v McNeil.*[19] Kirby P's observations were also cited with approval in *Attorney-General v Pickering.*[20] The facts of these two New Zealand cases are instructive, particular as in this case the Judge accepted a submission of Ms Hughes for the Council that the conduct of the appellants was "on a par with that of Mr Pickering"[21] in *Attorney-General v Pickering*.

[44] In *Attorney-General v Pickering* the defendant was prosecuted and convicted for offences under animal protection legislation for use of an unlicensed animal remedy. Despite that conviction, he continued to offend. He was charged with further offences. Before his second trial, the Attorney-General sought an injunction to prevent him using or selling the animal remedy, citing his previous offending as evidence of his disregard for the law. The Court granted the injunction. Doogue J said that matters of particular relevance were that it was clear that the defendant's stance was that he was entitled to continue to use and supply the remedy, and that he did not consider his actions were unlawful. The Judge said that if there was any suggestion by the defendant that he would abide by the law, there would be no need to consider the exercise of the Court's discretion in that case, but the defendant's own evidence suggested "quite otherwise". The Judge was therefore satisfied that this was "one of the rare cases where the Court should intervene because of the clear and persistent acts by the defendant, in breach of the Act and Regulations".

[45] In *Land Transport Safety Authority v McNeil*,[22] the defendant had conducted road transport goods services for several years without the required licences and without paying road user charges. He had carried on business through a number of companies and partnerships, each of which amassed a backlog of fines and charges and then went into liquidation having transferred its vehicles to a new entity. The defendant had also used a number of false names to disguise his involvement in road transport operations. The plaintiff argued that the sanctions provided in the Road User Charges Act 1977 and the Transport Services Licensing Act 1989 were

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[19] *Land Transport Safety Authority v McNeil* [1998] 1 NZLR 622 at 636-637 (HC).
[20] *Attorney-General v Pickering* (1998) 16 CRNZ 46 (HC).
[21] At [66].
[22] *Land Transport Safety Authority v McNeil* [1998] 1 NZLR 622 (HC).

rendered completely ineffective and sought an injunction restraining the defendants from being involved in the operation of goods services. An injunction was granted.

The District Court decision

[46] After noting the general rule against the granting of an injunction, and that in "exceptional situations" an injunction may nevertheless be granted, the Judge briefly noted the background facts of *Attorney-General v Pickering.*[23] The Judge continued:

> [66] In this case Ms Hughes addressed this issue only after I had raised it with her at the close of her final submissions. She submitted that the conduct of the defendants in this case was on a par with that of Mr Pickering. She pointed out that "various members of the extended Gibbs family" had been involved in constant disputes with the Council. These are summarised in a Council report on issues relating to Clifton Road and the Te Horo stock tunnel dated 2 June 2009, produced as an exhibit by Mr Handcock. The relevant passage of the report reads as follows:
>
> > These disputes have resulted in claims being made in various Courts, that the Gibbs were entitled to return of the lands under the Public Works Act; defamation proceedings were issued by the Chief Executive of the New Plymouth District Council against Mr Victor Gibbs on one occasion and threatened on another occasion, both instances resulted in an acknowledgement of wrongdoing and indeed compensation being paid; there have been disputes over the Proposed District Plan as it applied to the Gibbs property; the Gibbs have an application before the Maori Land Court to declare a portion of their property a reservation, which the Council is opposing because part of the reservation includes the road or proposed road; the Council have prosecuted the Gibbs for constructing a wharenui without resource consent; the Gibbs unsuccessfully appealed that conviction and have now unsuccessfully sought leave to appeal to the Court of Appeal regarding that matter. These various encounters which are by no means all encounters had with the Gibbs have created an environment where negotiations are difficult.

[47] The Judge noted Mr Gibbs' response to the effect that he had not been involved in some of the matters referred to in the Council report. He said that Mr Gibbs nevertheless accepted that he had been "involved in many of the disputes referred to; and in particular was involved in the Council prosecution for the construction of a wharenui without resource consent". The Judge then said:

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[23] *Attorney-General v Pickering* (1998) 16 CRNZ 46 (HC).

> [68] In those circumstances, and bearing in mind that the maximum under s 242 of the Act for a breach of s 112 is the modest sum of $500 plus $20 a day for continuing offences, I consider that Ms Hughes' point is well made.
>
> [69] There are two further factors which, in my view, mark this case out as different. First, bearing in mind Mr Gibbs' overall stance that the Council should have proceeded under s 111, a criminal conviction might not have been assured; if his defence was that he would have allowed entry had the District Court permitted it after hearing his objection under s 111(4), then a Court might well have concluded that his obstruction of the surveyors was not wilful even if misguided. Secondly, even if there was a conviction, that would not of itself allow access for the surveyors.
>
> [70] I therefore conclude that, in the unusual circumstances of this case, the existence of the criminal offence in the Act does not prevent me from granting an injunction if I am otherwise satisfied that I should do so.

[48] With all due respect to the Judge, I am satisfied that he was in error in his conclusion that the circumstances of this case justified granting an injunction. My reasons are as follows.

[49] In *Peek*, Kirby P commented, as earlier noted, that "it is not particularly helpful to say that 'special' or 'exceptional' circumstances must be established". While I agree in the sense that these words, standing alone, do not take the enquiry very far, they are nevertheless indicative of the fact that there are substantial limits on the power to grant an injunction when the sanction prescribed by Parliament is to prosecute for an offence.

[50] Kirby P's outline of the circumstances in which injunctive relief will be offered was, as he said, not intended to be exhaustive. It nevertheless demonstrates that the applicant for the injunction must provide evidence which establishes that the statutory provision that has been provided as a sanction will clearly be inadequate and should be supplemented or, as sought in this case, supplanted, by the judicial remedy of an injunction.

[51] In my judgment, the circumstances relied on by the Judge in this case fall well short of the circumstances outlined by Kirby P. And they fall well short of the circumstances described by Lord Wilberforce as those which, in practice, are likely to warrant exercise of the power to grant an injunction.

[52] This is not a case where the appellants have already been convicted for the offence in question. The circumstances relied on by the Judge were not even occasions when the appellants evinced an intention to obstruct the surveyor and, in consequence, commit the offence created by s 112(2). *Attorney-General v Pickering* and *Land Transport Safety Authority v McNeil* are to be distinguished because both involved previous offences by the defendant against the statutory provision in question, and clear evidence that this offending would continue irrespective of a further successful prosecution. As a matter of broad principle, proof of prior offending against the relevant statutory provision may not be required in every case. This was noted by Bridge LJ in the passage cited above at [41]. But as Bridge LJ also observed, proof that the authority has exhausted the statutory remedy, by prosecuting the defendant, is likely to be the evidence needed before the Court can draw the inference "that the offender is … 'deliberately and flagrantly flouting the law'". "The law" is the criminal sanction in the statute under consideration.

[53] The only fact which provides any link to flouting the law is the fact, admitted by Mr Gibbs, that he, as the Judge put it, "was involved in the Council prosecution for the construction of a wharenui without resource consent". As was clarified during the course of the appeal, the offence was constructing a wharenui without the necessary consent under the Building Act 2004. Conviction for failing to obtain a building consent does not in my judgment provide grounds for drawing the inference that the appellants have a general propensity to commit criminal offences, let alone the necessary inference that they would commit the offence under s 112.

[54] The other matters relied on by the Council and given weight by the Judge should not have been advanced by the Council even as grounds for criticism of the appellants. The fact that the appellants have disputed the Council's proposed District Plan is not evidence of a propensity to flout the law, criminal or otherwise. It is the exercise of a legal right. So too is the application by the appellants to the Maori Land Court. Appeal against the conviction for building a wharenui without a consent is also not something that should be advanced as indicating a propensity to flout the law. If there is to be criticism in this regard, it is properly directed to the Council in raising these matters as indicative of relevant propensities on the part of the appellants. This is given some emphasis by the fact that the Council also relied

on the fact that defamation proceedings had been issued against another member of the Gibbs' family.

[55] The judge referred to three other matters.[24] The fact that the maximum penalty is $500 does not in my judgment support the issue of an injunction in the absence of evidence that this penalty has been ineffective in the past in deterring these appellants. The fact that a criminal conviction might not have been assured, because of the appellant's contention that the Council should have proceeded under s 111, does not in my judgment provide grounds for issuing an injunction. Rather, it reinforces one of the reasons for the general rule, noted at [39](a) above. If there might be difficulty in securing a criminal conviction, that is all the more reason not to by-pass the criminal law and grant the civil remedy. The Judge's final reason was that a conviction would not of itself allow access for the surveyor. Strictly speaking, that is correct, but that will apply under numerous, perhaps most, statutory provisions providing criminal penalties for breach of statutory rights.

[56] There are further considerations. The Judge said that the present issue was only addressed when he raised it at the close of final submissions for the Council. I apprehend from this that no notice was given to the appellants that the issues now being considered, and, in particular, the matters that were relied on by the Judge, would need to be addressed by the appellants in the course of evidence. An affidavit of the Council officer, Mr Handcock, did refer to the appellants' construction of the wharenui without a building consent and to the appellants' application to the Maori Land Court. However, this was recorded in an affidavit to illustrate the officer's statement that "it is fair to say, that the Gibbs and the Council do not share a happy relationship". The Council sought the injunction, and concluded its case, without regard to the need to prove that the appellants were people who were likely deliberately and flagrantly to flout the law in ways relevant to the issue whether an injunction could be granted. It is unfair that conclusions adverse to them should now be drawn in the way that they have been drawn. All of this arises from the Council's seeking a remedy without adequate consideration of the circumstances in which they might be entitled to it.

[24] At [68]-[69], recorded above at [47].

[57] There is evidence that the appellants, in respect of matters directly related to the s 110 dispute, were in fact not indifferent to the law. Immediately on receipt of the notices from the Council, sent with the letter of 3 February 2010, the appellants sought legal advice. The advice they got proved to be wrong, having regard to the decision as to the applicability of s 110. But the relevant point here relates to inferences that might be drawn. The reasonable inference to be drawn is that the appellants would not act contrary to legal advice; it certainly points against an inference that they would. The further inference to draw from this is that the appellants would not obstruct a surveyor acting under s 110 if the appellants received a decision of a Court to the effect that their solicitor's advice was wrong and that the Council is entitled to act under s 110. Had the Council applied to the High Court for a declaration, the declaration could have been made under the Declaratory Judgments Act. The grant of a declaration would not have been dependent on the issue of an injunction, with the declaration being ancillary to the injunction, as was the case in the District Court.

[58] My conclusion as to the appellants' intentions is reinforced by advice from Mr Gibbs to me during the course of the hearing. Mr Gibbs made clear that, if this Court concludes that the Council can proceed under s 110, he and Mrs Gibbs, as occupiers of the land, will not prevent the surveyor entering the land to conduct a survey under s 110. Mr Gibbs expressly undertook to the Court, for himself and Mrs Gibbs, that they would not obstruct the surveyors entering their land pursuant to s 110.[25] This undertaking was given at the conclusion of a discussion I had with Mr Gibbs in which I made two matters clear. The first was that I had, at the point of this discussion, formed the clear view that the Council was entitled to act pursuant to s 110. The second matter was that, given the application of s 110, breach of the undertaking could constitute contempt of Court. Mr Gibbs advised that he fully understood the implications, and had understood them before I referred to the question of contempt of Court. In the course of the discussion, and before any reference by me to contempt of Court, Mr Gibbs had also made clear that, if there was a ruling by the Court that s 110 applies, he and Mrs Gibbs would not be doing

[25] Ms Hughes advised that there is no concern that the third appellant, Mr Horton, would obstruct the surveyor.

anything which would put them at risk of being prosecuted for an offence against the Act, or of being in contempt of Court.

Conclusion

[59] The respondent Council is entitled to proceed under s 110 of the Act. However, there are no sufficient grounds to issue an injunction. In consequence the District Court order granting an injunction, and the ancillary declaration, are set aside.

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Woodhouse J