

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA560/2016
[2018] NZCA 325**

BETWEEN	TONI COLIN REIHANA Appellant
AND	RAKIURA TITI COMMITTEE First Respondent
	STEWART BULL Second Respondent
	RON RANUI BULL Third Respondent
	SONIA RAHITI Fourth Respondent

Hearing: 14 August 2018

Court: Kós P, French and Miller JJ

Counsel: Appellant in person
C M Lenihan for First Respondent

Judgment: 27 August 2018 at 3.00 pm

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The appellant must pay the first respondent 75 per cent of costs for a standard appeal on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Miller J)

[1] Mr Reihana has brought three proceedings in the High Court, all alleging mismanagement of the Beneficial Tītī Islands, a group of 21 islands reserved for Rakiura Māori.

[2] The Titi (Muttonbird) Islands Regulations 1978 provide for governance of the islands and prescribe that disputes must be referred to an independent decision maker. Gendall J stayed Mr Reihana’s proceedings until that process has been completed in each case.¹ This appeal is brought against that decision.

Governance of the Tītī Islands

[3] Gendall J surveyed the islands’ history since 1864, when they and Rakiura (Stewart Island) were transferred to the Crown by Deed of Cession.² We need not repeat that. For our purposes a short explanation suffices.

[4] Briefly, Rakiura Māori who have a beneficial interest in a particular island (beneficiaries) enjoy the right to enter that island and take tītī (muttonbird or sooty shearwater) chicks in season. Rakiura Māori are members of Ngāi Tahu or Ngāti Mamoe iwi who are also descendants of Rakiura’s original Māori owners. No other person may enter the Islands without a permit, although beneficiaries may authorise their family members to enter onto an island in accordance with the tikanga associated with that island. The regulations establish a framework for self-governance by those who have the knowledge and experience to govern according to tikanga, which encompasses Māori customary law and practice.³

¹ *Reihana v Rakiura Titi Committee* [2016] NZHC 2048, [2016] NZAR 1491 [HC judgment].

² At [5]–[8]. We note that Gendall J had the assistance of Te Rūnanga o Ngāi Tahu, who filed submissions on this subject as an intervenor in the proceeding. Te Rūnanga o Ngāi Tahu did not apply to intervene in the appeal.

³ We need not attempt a definition of tikanga. For our purposes it suffices to note that it includes but is not limited to customary law. We refer to, for example, Natalie Coates “The Recognition of Tikanga in the Common Law of New Zealand” (2015) NZ L Rev 1 at 4; and Linda Te Aho “Tikanga Māori, Historical Context and the Interface with Pākehā Law in Aotearoa/New Zealand” (2007) 10 Yearbook of New Zealand Jurisprudence 10 at 10–11.

[5] The regulations provide for the Rakiura Titi Committee, which is elected at an annual meeting. Each island may have a Supervisor, who is nominated at the annual meeting by those frequenting that island and is appointed by the Committee.⁴

[6] The regulations set out certain obligations for anyone birding or using the Islands:

4 Provisions relating to birding and use of islands

- (1) Birding shall not commence earlier than 1 April and must cease with 31 May in each year, and no person shall take muttonbirds at any other time.
- (2) No person shall take any parent bird at any time, either on or off the said land.
- (3) Every person making holes in burrows to take out the birds shall cause those holes to be refilled and stopped, where it is possible to do so, so that no water can enter the holes and thereby destroy the burrows.
- (4) Every person taking any dog on to the said land shall keep it properly chained up to prevent it destroying the burrows. If dogs are used to catch the birds, they must be kept by the owner under his absolute control, and he shall be responsible for any damage done by them.
- (5) No person shall take any cat, or cause any cat to be taken, on to the said land.
- (6) No person shall light any fire on the said land except for domestic purposes or a signal fire in cases of emergency, and any fire originating from torches or otherwise accidentally must be immediately extinguished by the person causing it to be lit.
- (7) All persons frequenting the said land shall take all necessary precautions to provide for the exclusion and destruction of vermin, such as rats, mice, stoats, and weasels.
- (8) Every person taking muttonbirds must immediately dispose of all refuse and offal therefrom in a lawful manner and must not allow the same to accumulate and become a nuisance and menace to health.
- (9) Manus (or bird-catching areas) on a beneficial island shall be allotted to persons by the majority of the beneficiaries present on their island in the year the manus are allotted or, if such a majority of beneficiaries cannot agree on allotment, by the Supervisor for the island.
- (10) No person shall have any firearm in his possession while he is on the said land.

⁴ Titi (Muttonbird) Island Regulations 1978, regs 6 and 8.

[7] A beneficiary may erect a house or whare on a site approved in writing by the majority of beneficiaries present on an island in the year when the site is selected, or by the Supervisor if they cannot agree.⁵

[8] The Supervisor is responsible for allocating manus, or bird-catching areas, and other privileges, opportunities and rights:

6 Supervisors

- (1) ... The Supervisor shall be responsible for ensuring a fair and equitable distribution of the privileges, opportunities, and rights under the regulations of all persons authorised to enter the island or part of an island. In addition to any other powers prescribed in these regulations, the Supervisor shall have power to call meetings of all beneficiaries on their island at the time for the purpose of approving sites for buildings and allotting manus and generally supervise the conduct of birding operations on the area under his supervision. He shall be required to report to the Committee any infringement of these regulations ...

[9] The power to issue permits to enter the Islands is vested in the Committee.⁶

[10] Disputes arising out of the regulations must be referred to the Committee.⁷

- (2) If there is any dispute between Supervisors concerning the allotting of manus or any other dispute arising out of these regulations, the dispute shall be referred to the Committee who shall call a meeting of the Supervisors or other parties concerned to settle the dispute as soon as possible thereafter. Failing agreement being reached by the Supervisors or parties, or if they do not attend the meeting so called, the Committee shall make the decision, which shall be final and binding on all parties.

[11] There is a right of review by an independent decision maker. It may be exercised by any beneficiary who is dissatisfied with a decision of the Committee:

9 Referral to independent decision maker

- (1) A beneficiary (an applicant) who is dissatisfied with a decision of the Committee may apply, in writing to the Committee, for the matter to be referred to an independent decision maker for resolution.

⁵ Regulation 5.

⁶ Regulation 3(2A).

⁷ Regulation 6.

- (2) The Committee must,—
 - (a) within 10 working days after receipt of an application under subclause (1), notify any other parties directly affected by the decision to which the application relates (the other parties); and
 - (b) within 15 working days after—
 - (i) receipt of the application, attempt to reach an agreement under subclause (3)(a)(i)(A) if no other parties are involved; or
 - (ii) giving notification to the other parties, attempt to facilitate an agreement under subclause (3)(a)(i)(B) if any other parties are involved.
- (3) The person to be appointed as independent decision maker—
 - (a) must—
 - (i) be agreed on—
 - (A) by the Committee and the applicant if no other parties are involved; or
 - (B) by the applicant and the other parties if any other parties are involved; and
 - (ii) be appointed by the Committee; but
 - (b) may be decided on, and appointed, by the President of the Arbitrators' and Mediators' Institute of New Zealand Incorporated if—
 - (i) agreement has not been reached under subclause (3)(a); and
 - (ii) the applicant has, within 15 working days after the expiry of the time specified in subclause (2)(b), made an appropriate written request to the President.
- (4) The procedures for resolution may—
 - (a) be agreed on by the applicant and the other parties; or
 - (b) be decided on by the independent decision maker, if agreement has not been reached under paragraph (a).
- (5) The independent decision maker must attempt to resolve the matter by mediation.
- (6) However, if the independent decision maker believes that mediation has failed, or will fail, to resolve the matter, he or she may resolve the matter in any way he or she considers appropriate.

- (7) Nothing in this regulation prevents more than 1 independent decision maker being appointed in relation to a particular matter and, if more than 1 independent decision maker is appointed, this regulation applies with all necessary modifications.

The claims

[12] Mr Reihana is a beneficiary with rights to enter and take birds at Hinekuha manu on Te Kanawera (also known as Taukihepa) tītī island.⁸

[13] Having surveyed the regulations we can now put his complaints in context. The pleadings are complex and repetitious, but in argument Mr Reihana helpfully identified the central disputes:

- (a) As the appointed Supervisor in the years prior to 2015, he banned his cousin, Pierre McManus, from the island for serial breaches of tikanga. The power to exclude a fellow beneficiary is not expressed in the regulations; rather, he says it is a customary power vested exclusively in him as Supervisor. His decision was never implemented by the Committee, which refused to recognise his power to ban a beneficiary and refused to refer the issue to an independent decision maker under reg 9.
- (b) He was removed as Supervisor at the annual meeting on 21 February 2015, the Committee having refused, contrary to past practice, to recognise many written nominations by members of his whānau.
- (c) The appointment of Pierre McManus as Supervisor at the same meeting was unlawful for the same reason, and also because Mr McManus is unworthy of the role having regard to his disrespect for tikanga.
- (d) At the instigation of Mr McManus the Committee, also at the same meeting, refused Mr Reihana permits to bring builders onto the island.

⁸ The regulations suggest Hinekuha is an island itself, and the Judge appears to have thought so: HC judgment, above n 1, at [22]. However, Mr Reihana described the manu in this way and we are content to adopt his description.

This was done on the pretext that there was a dispute about the building site on which stands his partially built whare.

- (e) Mr Reihana's builders accompanied him to the island on 15 March 2015, but two days later the Committee removed them, with police assistance, on the ground that no permits had been issued. This was done notwithstanding that the two builders were whānau and therefore beneficiaries who did not need permits in the first place.
- (f) He has suffered financially as a result through wasted costs and subsequent weather damage to the unfinished whare, and wants compensation both for that and for breach of his public law rights.
- (g) In addition, Mr McManus has erected four structures without obtaining the approval of the beneficiaries or the Supervisor.

[14] The proceedings are an amalgam of judicial review and tort causes of action. Mr Reihana says, for example, there were very many breaches of process by the Committee and its Chair, who are biased, and he also seeks damages for misfeasance in public office.

Merits of the stay

[15] Gendall J exercised the High Court's jurisdiction under r 15.1 of the High Court Rules 2016, which allows the Court to stay a proceeding for abuse of process on such conditions as it thinks just. He found these proceedings an abuse because there is an alternative and more appropriate method of resolution under the Regulations, and a right of appeal from Committee decisions under reg 9.⁹

[16] We agree. We may state our reasons shortly.

[17] Underpinning the claims appears to be an intra-whānau dispute over rights at Hinekuha manu and what may be a broader dispute among Rakiura Māori about rights

⁹ HC judgment, above n 1, at [46]–[51].

and obligations under tikanga. Through his proceedings, Mr Reihana seeks to take decisions about these matters out of the hands of the Supervisor for the time being, the Committee for the time being, and any independent decision maker appointed under reg 9.

[18] Mr Reihana justifies this by arguing that the tort and misfeasance claims cannot be decided under the regulations and questions of interpretation of the regulations must be answered by the courts. We accept that he has pleaded allegations of law, and we must assume for present purposes that his factual allegations may prove to be true.¹⁰ But it remains the case that the underlying rights and obligations can and should be resolved under the Regulations, because they involve tikanga and because the Regulations vest governance of such matters in Rakiura Māori.¹¹ That process should help clarify and reduce any remaining issues that must be resolved by the courts.

[19] Mr Reihana submits that most of his allegations — he suggested 75 per cent — are amenable to judicial review. He argues that it would be time consuming and inefficient to insist that disputes under the Regulations be resolved before the High Court proceedings, which could settle everything. We do not agree. As just explained, we think the core issues should be resolved under the Regulations. In addition, the factual allegations could not be settled without making findings on contested facts, meaning that they are not suited to the processes of judicial review. Oral evidence would be required. Mr Reihana would be wise to recognise that a judicial review application may fail for this reason alone. And finally, a judicial review is not an appeal; should he succeed in reviewing any given decision, it would likely be returned to the Committee for further decision.

Result

[20] The appeal is dismissed.

¹⁰ *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267.

¹¹ *Reihana v Christchurch Maori Land Court* HC Christchurch CP94/00, 28 February 2001 at [9] and [47]; and *Reihana v Rakiura Titi Committee* (1996) 4 Te Wai Pounamu Appellate MB 144(4) (4 APTW 144(4)) at 154.

[21] The Committee seeks costs. We accept that costs are appropriate, albeit at the lowest level. This decision has nothing to do with the underlying merits of the disputes. It simply recognises that the Committee has succeeded on this appeal. That said, the appeal was straightforward and we do not consider a full costs award is warranted in this case. The appellant must pay the respondent 75 per cent of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Scholefield Cockroft Lloyd, Invercargill for First Respondent