IN THE COURT OF APPEAL OF NEW ZEALAND

CA734/2008
[2009] NZCA 60

	BETWEEN	THE BENEFICIAL OWNERS OF WHANGARURU WHAKATURIA NO 4 Appellants
	AND	MURRAY DARROCH WARIN, ROBIN WARIN, MALCOLM IAN JENSEN AND KATHARINA AGNES LOUISA ELIZABETH JENSEN First Respondents
	AND	THE REGISTRAR GENERAL OF LAND Second Respondent
	AND	THE MAORI TRUSTEE Third Respondent

Hearing: 17 February 2009

Court: William Young P, Hammond and Robertson JJ

Counsel: R M Bell for Appellants
W W Peters for First Respondents
J A L Oliver for Second Respondent
T K T A R Williams for Third Respondent

Judgment: 9 March 2009 at 11am

JUDGMENT OF THE COURT

A The proposed appeal is struck out for want of jurisdiction in this Court.

B The issue of costs is reserved.

REASONS OF THE COURT

(Given by Robertson J)

Introduction

[1] An appeal has been lodged with the Court against a decision of Allan J following a trial in the High Court at Whangarei, in which it was held that the first respondents have an indefeasible title in respect of Certificate of Title NZ73D/366 registered under the Land Transfer Act 1952 (HC WHA CIV 2006-488-000245 31 October 2008).

[2] In the Court's Miscellaneous Motions List, the appellants sought directions:

(a) adding them as defendants in the High Court proceeding;

(b) authorising the appeal to proceed (if required);

(c) extending the time to appeal (if required);

(d) appointing counsel to represent them;

(e) for payment of counsel's costs from public funds under s 99A of the Judicature Act 1908.

[3] This is a pre-appeal application, the outcome of which will determine whether the appellants can proceed with an appeal. As we discuss below, we have concluded that the appellants cannot appeal to this Court in this way, and that this Court does not have jurisdiction to add them as defendants in the High Court proceeding.

[4] The case is about freehold land in Bland Bay near Whangaruru in Northland. The Maori Trustee held land in Whangaruru Whakaturia No 4 under a trust established under s 438 of the Maori Affairs Act 1953. It permitted sale of the land. The land was partitioned and part was sold.

[5] Te Ture Whenua Maori Act 1993 came into force on 1 July 1993. It had new provisions relating to the sale of land by trustees including the requirement that the Trustee:

(a) obtain the consent of three quarters of the beneficial land owners;

(b) offer the land to a preferred class of alienees;

(c) obtain an order from the Maori Land Court confirming settlement; and

(d) obtain a valuation by the Valuer-General prior to any sale.

[6] In July 1995, the Maori Trustee signed an agreement to sell Lot 32 to the first respondents for $60,000. It is accepted that none of the requirements of the Te Ture Whenua Maori Act were complied with. Notwithstanding that, there was a transfer registered under the Land Transfer Act which showed the first respondents as the registered proprietors.

[7] In 2002 the first respondents applied to the Maori Land Court for an order changing the status of their land to "general land". This was dismissed. The respondents then applied for a rehearing of that application and made an application for a determination that they were owners of the land under s 18 (1)(a) of the Te Ture Whenua Maori Act. This also was dismissed.

[8] In those proceedings, the Maori Land Court appointed counsel to represent the interests of the appellants. Neither the Maori Trustee nor the Registrar General were parties to those proceedings.

[9] The first respondents appealed to the Maori Appellate Court. The beneficial owners were again represented by counsel appointed by the Court. The Court dismissed the appeal, but expressly reserved the question of indefeasibility.

[10] There was no appeal from the Maori Appellate Court to this Court.

[11] The present proceedings were then commenced. The first respondents sought a declaration that they (as the transferees in a transfer registered under the Land Transfer Act against the Certificate of Title) had the benefit of indefeasible title.

[12] The only defendants in that proceeding were the second and third respondents. The beneficial owners of Whangaruru Whakaturia No 4 (the current appellants) were never parties, presumably in reliance on what was r 77 and is now r 4.23 of the High Court Rules.

[13] The case was heard in December 2006. Both the second and third respondents were supportive of the claim. However, Allan J directed in October 2007 (prior to delivery of the judgment) that there should be representation before the Court of the appellants as the beneficiaries of the land. Arrangements were made for the appointment of Mr Bell as amicus curiae. In formal terms Mr Bell was appointed as amicus, although the metes and bounds of that role were blurred by the manner in which he approached his brief. In the end, although the appellants were not parties to the proceeding, their interests were advanced by Mr Bell as if they were (see below at [37] and [40]).

[14] Allan J referred to Mr Bell throughout as amicus (and noted that counsel had not received instructions from the beneficiaries). However, there is some imprecision about his role. In his minute of 23 October 2007, the Judge said he was:

> [1] satisfied… that this proceeding ought not to be determined in the absence of counsel representing the former beneficiaries of the land in question.
>
> [2] I have in mind appointing counsel to represent the interests of the beneficial owners...
>
> [3] Ordinarily the Solicitor-General would be asked to represent the parties concerned, but that does not appear to be appropriate here… having regard to the necessarily partisan approach which would, in this particular case, need to be taken by counsel so appointed.

[15] There was a further hearing in the High Court on 16 June 2008 with Mr Bell appearing. The reserved judgment followed.

[16] The first question is whether the persons on whose behalf and for whose interests Mr Bell argued – the beneficial owners of the land – have a right of appeal against the decision. Alternatively, whether Mr Bell as amicus has standing to appeal.

[17] It is contended that the appeal should be permitted to proceed because:

(a) the appellants are adversely affected by the decision of the High Court;

(b) there are inconsistent final decisions of courts of competent jurisdiction concerning the ownership of the land;

(c) the Maori Land Court dismissed the first respondent's application for a determination that they were owners of the land in question and that decision was upheld by the Maori Appellate Court whereas the High Court has held that they have an indefeasible title; and

(d) more generally, that there is a collision between the purposes of the Te Ture Whenua Maori Act and the doctrine of indefeasibility under the Land Transfer Act.

[18] The nub of the opposition by each of the respondents is that:

(a) the appellants were not parties to the proceeding in the High Court and cannot appeal; and

(b) Mr Bell's appointment was under r 81 of the High Court Rules 1985 (now r 4.27 of the High Court Rules 2008) terminated following judgment in the High Court, thereby making an appeal by him as amicus to this Court impossible.

(c) This Court ought not to join the appellants as defendants.

Discussion

Standing of an amicus to appeal

[19] An amicus is not a party to an action but a person appointed by the Court. Salmon LJ in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 at 226 said the role of an amicus was:

> … to help the court by expounding law impartially, or if one of the parties were unrepresented, by advancing legal arguments on his behalf.

[20] There is a dichotomy apparent in that statement. There is a substantial difference between expounding law impartially and advancing legal arguments on a party's behalf. The latter involves partisan advocacy, while the former does not; the latter involves engaged confrontation with opposing counsel, but the former involves giving assistance to the court in a neutral and comprehensive way, particularly to ensure that all aspects of a dispute are teased out and addressed.

[21] What is true of all amici, however, is that they are not parties. They are appointed at the discretion of the court and the extent to which they may file documents and present legal argument is at the discretion of the court. Unlike orders for joinder as a plaintiff or a defendant, appointments of amici curiae do not require the consent of the parties.

[22] The High Court of Australia in *Levy v Victoria* (1997) 189 CLR 520 considered the basis upon which an amicus may be heard in a given case. Brennan CJ said (at 604-5) that:

> The footing on which an amicus curiae is heard in that that person is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted… an amicus will be heard when the court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.

[23] Commenting on *Levy v Victoria* and the potential for a blurring of the scope of the amicus's role in a proceeding, the Hon Justice Susan Kenny (while a Judge of the Court of Appeal of the Supreme Court of Victoria) suggested that express provision ought to be made restricting amicus participation to written submissions. This, she suggested, would give parties the opportunity to reply to arguments advanced by amici rather than being faced with a de facto third party to the proceeding (see "Interveners and Amici Curiae in the High Court" (1998) 20 Adel LR 159 – 171 at 170).

[24] In 2001 the then Attorney-General of the United Kingdom, Lord Williams, in consultation with the then Lord Chief Justice, Lord Woolf of Barnes, set up a working group to clarify and regularise the role of amicus. The working group issued a memorandum to judges providing that a court may seek the assistance of an amicus (re-named an "advocate to the court") when there "is a danger of an important and difficult point of law being decided without the court hearing relevant argument" and that the function of the advocate is to "give the court such assistance as he or she is able on the relevant law and its application to the facts of the case". In the United Kingdom, therefore, the role of an amicus is expressly rooted in assistance to the court, not in a species of third-party representation.

[25] The present case demonstrates how, if an amicus is permitted to participate in a proceeding essentially as a party, confusion may result as to their rights and obligations in subsequent stages of the proceeding. The issue for us is the right of appeal, but the potential problems where successful parties want to seek costs against an amicus whose participation in the proceeding necessitated substantial additional work for the parties', are very real. Although there is provision for the payment of costs from public funds under the Judicature Act, that could be problematic where the participation of an amicus strays into the realm of truly partisan advocacy rather than impartial presentation of information to the court.

[26] Where an amicus is appointed to represent the interests of an otherwise unrepresented person or group, it is inevitable that to some extent they will present partisan argument. That is because the person or group being represented has particular interests that will likely be at odds with one or both of the parties' interests. But, if the genesis of the amicus's inclusion in a proceeding is viewed as emanating from the court rather than from an instructing party, then conceptual problems of appeal like that in this case disappear. Once judgment is issued, the court's need for the amicus is exhausted, whether or not the represented group's interest has prevailed.

[27] Another kind of non-party that may be given leave to participate in a proceeding is an intervener. Whereas an amicus is appointed at the behest of the court, an intervener enters a proceeding voluntarily because they have an interest in

the case or responsibilities in the matter at issue in their own right. Although in New Zealand (cf Australia and the United States) an intervener is still not a party and cannot therefore exercise appeal rights any more than an amicus can (see *Fairfax New Zealand Ltd v New Zealand Police* [2008] NZCA 39 at [29] (CA)), the appointment of an intervener rather than an amicus may be appropriate in cases where the issues that the intervening party will address require or compel substantially partial legal argument.

[28] In *Auckland Area Health Board v Attorney-General* (1992) 5 PRNZ 119 (HC), for example, there was an originating application by the Auckland Area Health Board for a declaration as to whether removing a terminally ill patient from life-support would amount to manslaughter. The Attorney-General was originally named as a defendant but removed with consent, and she sought appointment as amicus or, alternatively, as intervener. Noting *Adams v Adams [A-G intervening]* [1970] 3 All ER 572 Thomas J considered that because the proceeding raised matters of public importance and the relief sought would impinge upon the prosecutorial discretion and prerogative powers of the Crown, it was appropriate for the Attorney-General to be appointed as an intervener, rather than as an amicus (at 123).

[29] Mr Bell was not engaged by the beneficiaries, but by the Court. He was not in a position himself to seek appointment as an intervener, or the beneficiaries' joinder as defendants. Despite this, he approached his brief as though he were an intervener or a joint defendant, rather than an amicus. It would perhaps have been preferable for an application to have been made for the beneficiaries' joinder, or to have restricted Mr Bell's role to that of a conventional amicus.

[30] In the event, counsel performed a kind of hybrid function, restricted by the formal limits on an amicus' role while being permitted in fact to proceed essentially as counsel for a party. That kind of middle ground has resulted in procedural confusion.

[31] There is good reason for the courts to be reluctant to admit interveners in civil proceedings, since unlike joined parties their appointment does not require the parties' consent. But that does not mean that an amicus should be used as a

backdoor route to substantially partial participation of non-party persons or interest groups in a proceeding.

[32] Counsel have found no instances where an amicus has been accorded standing to appeal to this Court against the judgment of the High Court and nor has our research uncovered any.

[33] The standing of amici to appeal once the proceeding for which they were appointed has terminated was considered in *The Contradictors v Attorney-General* [2001] 3 NZLR 301 (PC). Lord Millett held that the procedural choice to appoint an amicus rather than to join a member of the represented class as a defendant:

> [7] meant that there was no one in a position to instruct counsel in relation to the bringing of a further appeal.… If [The Contradictors] were already parties they could have appealed as of right. If they were not already parties they could have applied to be joined in order to appeal.

[34] His Lordship did not indicate how or where this application would proceed. A similar comment (also without elucidation as to the appropriate mechanics) can be found in *Emanuele v ASC* [1995] FCA 1762. In neither case on the facts was such late involvement a live issue.

[35] In the circumstances covered by r 4.23, the Court may order a person beneficially interested to become a party and this was exercised after judgment by Anderson J in *McDonald v Simmonds* (1994) 8 PRNZ 12 and in the course of a recall judgment.

[36] The tenure of an amicus endures for the length of a proceeding and terminates upon judgment. The amicus has no right of appeal from that judgment because they are not a party.

[37] The appellants argue that although Mr Bell was formally appointed as amicus, he was, in real terms, their counsel. On behalf of the appellants he filed a statement of defence and an affidavit, delivered interrogatories and presented legal submissions. The nature of Allan J's order that Mr Bell act as an amicus, it is submitted that the appellants became de facto parties to the proceeding, even though

they were not formally joined as parties. They therefore contended that an order of this Court adding them as defendants would be no more than a formalisation of what was already, in substance, effected in the High Court.

[38] The appellants submitted that justice requires that the corollary of their being bound by the High Court decision is that they have the same rights of appeal as other parties to the proceeding and that an order of this Court joining them as defendants would simply give formal recognition to the status they had in the proceeding in the High Court.

[39] It is not the case that simply by reason of their being affected by a judgment, a person has a right of appeal. Mr Bell cannot bring an appeal because he did not represent a party to the proceeding (see, in addition the decision of this Court in *The Contradictors v Attorney-General (No 2)* [1999] 2 NZLR 519; *Her Majesty's Attorney-General v Blake* [1997] EWCA Civ 3008; *Re McBain Ex Parte Australian Catholic Bishops' Conference* [2002] HCA 16).

[40] We accept that there is little more that Mr Bell could, or would, have done had he been counsel for a party. Statements of defence and interrogatories, for example, are adversarial rather than instructive, and while Mr Bell mounted an admirably comprehensive argument in support of the beneficiaries, his participation went beyond the role of an amicus.

Joinder of the appellants as defendants

[41] The appellants submitted that they ought to have been joined as defendants because they are both bound and adversely affected by the decision of the High Court, there has been no delay, and an appeal lodged on their behalf has good prospects. In those regards, they argued, their case is within the implied criteria for the making of an order for joinder stated by Lord Millett in *The Contradictors* (PC):

> [10] If the delay had caused no prejudice to the respondents, Their Lordships would have been willing to overlook it. It arose from the failure to join any of the Contradictors as a representative defendant and the consequent absence of anyone in a position to take timely steps to bring an

> appeal. Their Lordships would have made appropriate orders to join the petitioning beneficiaries as representative defendants…

[42] The respondents contended that any application for joinder should have been made before resumption of the hearing in June 2008, and that by failing to apply earlier for joinder and proceeding instead as an amicus, there can be no case now for effectively referring the matter back to the High Court to enable joinder to be considered.

[43] We do not accept that the appellants are correct. There is no power in this Court to add a party to a proceeding in the High Court so as to enable it to initiate an appeal. If the respondents had been unsuccessful in the High Court, and had initiated an appeal, it is very probable that an application for Mr Bell's continued involvement would have been granted. But that does not mean that we may grant the appellants a right to appeal. This Court is a creature of statute and the right to appeal is prescribed.

[44] There could be a serious issue which emerges from the arguable conflict between the decision of the Maori Appellate Court and that of the High Court, but that does not provide a jurisdictional route for an appeal to be initiated by the appellants either. The fact that there are lower courts' decisions which require reconciliation is not sufficient to create standing to appeal. The merits of the proposed substantive ground of appeal cannot affect such a fundamentally antecedent procedural issue as standing.

[45] We do not, however, agree with the respondents' that there are necessarily no available avenues open. The appellants could seek to recall the judgment in the High Court and to endeavour to persuade that Court that they should be joined as parties in the litigation, even at this late stage (see *McDonald v Simmonds*). Their status in the continued hearing in the High Court was somewhat unconventional. Without opposition, Mr Bell was permitted to file a pleading and evidence, but no attention appears to have been given as to the formal position.

[46] We offer no view about the proper outcome of such an action. All we hold is that there is the need to clarify what Mr Bell's role was intended to be in the

High Court and what in fact it was in the High Court. It is unhelpful to become fixated on a particular label which may or may not reflect what actually occurred.

[47] We are not unmindful that, if the appellants seek party status, questions will arise as to exactly who is included within the ambit of the class of beneficial owners of Whangaruru Whakaturia No 4. Those who wish to be parties will need to be aware of the potential for costs to be ordered against them. Those will be matters of assessment for the beneficial owners.

[48] There is no jurisdiction for us to make an order joining the appellants as defendants in the High Court proceedings. Nor is there any basis upon which we could grant authority for them to appeal directly to this Court, when they were not parties to the proceeding below. Mr Bell, as amicus, does not have standing to initiate an appeal.

[49] Questions of extension of time, representation and costs are accordingly moot.

Result

[50] The proposed appeal is struck out for want of jurisdiction. The issue of costs is reserved.

Solicitors:
Webb Ross, Whangarei, for Appellants
Wayne W Peters & Associates, Whangarei, for First Respondents
Crown Law Office, Wellington, for Second Respondent
Wackrow Williams & Davies, Auckland, for Third Respondent