IN THE COURT OF APPEAL OF NEW ZEALAND

CA441/2013
[2014] NZCA 271

BETWEEN	COLIN BIDOIS, JENNY ROLLESTON, TAARI NICHOLAS, PATRICK NICHOLAS, CHRISTOPHER (KIRITOHA) TANGITU, RAWIRI KUKA AND SHADRACH ROLLESTON AS THE MANDATED REPRESENTATIVES OF THE HAPU OF PIRIRAKAU Appellants
AND	RAPATA (ROBERT) LEEF, STEPHANIE TERIA TAIAPA, NADINE HORINA PIRAKE, KAINE RAROA TAIAPA, DARREN WILLIAM LEEF, NEIL HIRAMA AND PANIA ANEISHA BROWN AS THE MANDATED REPRESENTATIVES OF THE HAPU OF NGATI TAKA Respondents

Court:	Ellen France, White and French JJ
Counsel:	F M R Cooke QC for Appellants S P Bryers for Respondents
Judgment: (On the papers)	25 June 2014 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is granted.

B The respondents are granted leave to adduce further evidence in response to that adduced by the appellants within 15 working days of the date of this judgment.

C Costs on the application are reserved pending the outcome of the substantive appeal.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The appellants seek leave to adduce further evidence in support of their forthcoming appeal against a decision of Andrews J.[1] The application is made under r 45 of the Court of Appeal (Civil) Rules 2005.

[2] The respondents oppose the application.

[3] By consent the application has been dealt with on the papers.

Background

[4] The parties are the mandated representatives of two hapū[2] of Ngāti Ranginui. The appellants represent Pirirākau and the respondents Ngāti Taka. Both claim they hold mana whenua over certain lands subject to compensation under the Crown's Treaty of Waitangi settlement with Ngāti Ranginui.

[5] Before the settlement was signed, all of the hapū of Ngāti Ranginui (including Pirirākau and Ngāti Taka) entered into an agreement about how to deal with inter-hapū disputes involving competing mana whenua claims. The agreement, which we shall call the Mana Whenua Process Agreement, provided a three-stage process for the resolution of such disputes. Stage 1 involved the identification of claimed mana whenua interests, stage 2 a negotiation process and stage 3 an adjudication process.

[6] When negotiations between Pirirākau and Ngāti Taka failed to reach agreement, they sought to invoke the stage 3 adjudication process. However for reasons that remain controversial, that did not happen. Instead, they entered into

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1 *Leef v Bidois* [2013] NZHC 1349.

2 One of the issues in dispute is whether Ngāti Taka is a sub-hapū rather than a hapū.

their own separate agreement, which was described as an arbitration agreement. The arbitration agreement provided for a different resolution process than the stage 3 adjudication process. The nominated decision-makers subsequently issued an "arbitration award" in favour of Pirirākau.[3]

[7] Dissatisfied with the outcome, Ngāti Taka then issued proceedings in the High Court under the Arbitration Act 1996, alleging bias and breaches of natural justice on the part of the arbitrators.

[8] Justice Andrews held that all the resolution panel could do under the "arbitration agreement" was determine mana whenua status. They could not make any allocation decision and therefore their decision could not give rise to the possibility of a legal remedy. It followed in the Judge's view that the mana whenua dispute was not a dispute "in respect of a defined legal relationship" and was therefore not an arbitration.[4] She accordingly set the award aside.

[9] Pirirākau then filed an appeal against that decision in this Court.

The proposed new evidence

[10] The proposed new evidence consists of two affidavits.

[11] One of the affidavits has been sworn by Mr Coffin, the Chairman of the body formed for the purpose of negotiating the settlement between the Crown and Ngāti Ranginui. The affidavit explains the background to the Treaty of Waitangi settlement. Mr Coffin asserts that the reason why Pirirākau and Ngāti Taka did not follow the stage 3 adjudication process was because they wanted to have their dispute resolved before the settlement with the Crown was signed. The stage 3 adjudication was a formal and expensive process intended to be followed only after legislation had been enacted cementing the proposed settlement.

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[3] The arbitrators found that Ngāti Taka could not claim to be a separate entity, but was an integral part of Pirirākau.

[4] At [71], in accordance with s 2 of the Arbitration Act 1996.

[12] Mr Coffin further deposes that the arbitrators' determination was later included in a Ratification Information Booklet. This booklet set out the proposed allocations to the hapū. The booklet was circulated to all voting members of the iwi, voted upon and subsequently enshrined in a Settlement Trust Deed executed by representatives of all hapū and later by the Crown. According to Mr Coffin's affidavit, because all hapū had resolved mana whenua issues prior to the settlement deed being signed, the deed did not provide for the Mana Whenua Process Agreement to be included in the settlement legislation.

[13] The second affidavit is sworn by one of the appellants, Mr Bidois. It adduces correspondence exchanged between the solicitors of the parties following the High Court judgment.

Grounds of opposition

[14] In opposing the application, the respondents advance the following key arguments:

(a) Mr Coffin's evidence is not fresh.

(b) His evidence is neither cogent nor entirely reliable. Aspects of the evidence relating to the intention of the parties and the bypassing of the stage 3 adjudication process are disputed.

(c) Even if the evidence of Mr Bidois is fresh and reliable, it is not relevant.

Our decision

[15] The principles governing applications to adduce further evidence are well-established. The evidence must be fresh, credible and cogent. It will not be regarded as fresh if it could with reasonable diligence have been adduced at trial.

Evidence that is not fresh will only be admitted in exceptional and compelling circumstances.[5]

[16] The reason Pirirākau gives for not adducing Mr Coffin's evidence in the High Court is that both parties had agreed there was a defined legal relationship. It was not therefore considered necessary to adduce any evidence on that issue. Pirirākau could not reasonably have anticipated that the Judge would base her finding on an issue that was not raised by the parties.

[17] This is disputed by Ngāti Taka, who submit that the issue of whether the determination in question was an arbitration was very much a live issue and that there would have been an opportunity to call the evidence. They further submit that the Judge was aware of the relevant passages from the Ratification Information Booklet and must also have been aware from the terms of the Mana Whenua Process Agreement that it was not intended to operate before the settlement legislation was passed.

[18] We accept that the question of whether the process was in fact an arbitral process was raised during the hearing. However, the focus appears to have been on a different aspect of that question, namely whether the parties intended to submit to arbitration or an expert determination. The Judge expressly records that the parties agreed there was a legal relationship and goes on to say that "[w]ith respect, neither counsel addressed the whole of this element of the definition of an arbitration agreement".[6]

[19] In those circumstances, we consider that Mr Coffin's affidavit does amount to fresh evidence as defined.

[20] We also consider that the evidence is relevant to the issues raised by the appeal and would be helpful. In our view, in the circumstances of this case, the fact some parts of the evidence are disputed does not mean the application should be

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5 See *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA); and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 2 NZLR 190 (CA).

6 At [59].

dismissed but rather that Ngāti Taka should be permitted to call evidence in response.

[21] As regards Mr Bidois' affidavit, Ngāti Taka agreed that if Mr Coffin's evidence were introduced, then Mr Bidois' affidavit should also be introduced.

[22] We therefore grant the application and also grant the respondents leave to adduce any further evidence of their own in reply within 15 working days of the date of this judgment.

[23] We defer consideration of the issue of cross-examination to the panel who is to hear the substantive appeal. We would, however, urge counsel to endeavour to avoid the need for cross-examination.

[24] Costs on this application are reserved pending the outcome of the substantive appeal.

Solicitors:
Holland Beckett, Tauranga for Appellants
Martelli McKegg, Auckland for Respondents