

**IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY**

**CIV 2009-463-000471
[2012] NZHC 1960**

BETWEEN	POLLY PAREHUATAHI JONES Plaintiff
AND	DAVID WICKLIFFE Defendant

Hearing: 22 June 2012

Appearances: P Armstrong/T Wara for plaintiff
D Maniapoto/G Whata for defendant

Judgment: 7 August 2012

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 7 August 2012 at 11am,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:
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[1] This case concerns the right to possession of two kakahu (feathered cloaks). It is before the Court on an application by the defendant to strike out the plaintiff's claim on the grounds that it does not disclose a reasonably arguable cause of action, or is vexatious, frivolous and an abuse of process.

[2] The plaintiff opposes the application on the grounds that the statement of claim discloses a well-founded cause of action in detinue, brought seriously and for a proper purpose.

Background

[3] By birth the plaintiff and the defendant are sister and brother respectively, but were not raised as siblings. The defendant was raised by his great aunt, Pirihira Wikiriwhi (née Haimona) and her husband Tame Wikiriwhi, independently of his biological siblings as tamaiti whangai (that is, under a Maori customary adoption).

[4] One of the kakahu was woven in the 1920s by another great aunt, Ngatauta Haimona (sister of Pirihira), out of Kiwi feathers. The plaintiff pleads (and it does not appear to be disputed) that she wove it for Warena Haimona, the great aunts' brother and the parties' koroua (grandfather). The other was woven in the 1940s by Pirihira's sister-in-law Ereataua (or Etere) Kahui, Tame's whangai (adopted) sister, out of Pukeko feathers. The plaintiff pleads that she wove it for Tame.

[5] The cloaks were regarded as taonga (that is, treasured items). Following the deaths of Warena and Tame, custody of the kakahu was successively passed down within the whanau (family) on the death of the whanau member who had been holding them. The plaintiff received them in 2003 in that manner.

[6] The defendant contends that the kakahu were part of the residuary estate of Tame and Pirihira, which was left to him and another tamaiti whangai (adopted child) who was also his biological aunt, Te Raraku Smith. He says that he was not consulted when Te Raraku died and, in accordance with Maori custom, her biological sister (and the defendant's biological mother, Ketu Whata) passed the

kakahu to one of the defendant's biological siblings. They were then handed down through the whanau, and eventually passed to the plaintiff.

[7] It is common ground that from time to time the members of the whanau who held the kakahu lent them to other whanau members for special or ceremonial occasions.

[8] In 2008 the defendant collected the kakahu from the plaintiff to use at his daughter's graduation. The plaintiff has since requested their return, but the defendant has declined to return them.

Principles on strike out

[9] The application is brought under r 15.1 of the High Court Rules:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[10] The principles that the Court applies when determining such applications can be found in the decision of the Court of Appeal in *Attorney-General v Prince & Gardiner*.¹ Those principles were endorsed by the Supreme Court in *Couch v*

¹ *Attorney-General v Prince & Gardiner* [1998] 1 NZLR 262 (CA).

Attorney-General.² The principles, as relevant to the present application, can be summarised as follows:

- (a) The facts pleaded in the statement of claim are assumed to be true (whether admitted or not).
- (b) The cause of action must be clearly untenable.
- (c) The jurisdiction to strike out is to be exercised sparingly, and only in clear cases (where the Court is satisfied it has the requisite material available).
- (d) The jurisdiction can be exercised even where it requires extensive argument on difficult questions of law.
- (e) The Court will be slow to strike out a claim in a developing area of the law.

[11] As well as taking the pleaded facts to be true, the Court can also accept and take into account affidavit evidence on undisputed facts where it is consistent with the pleadings.³

The substantive claim

[12] The plaintiff pleads that following the deaths of Warena and Tame, the kakahu were handed down through the whanau (to specified family members), and that the person who held the kakahu from time to time was either the owner of them or held them on a discretionary trust in favour of the extended whanau. She says that she is the current owner or trustee, and pleads that she has “a right of possession of the kakahu”.

[13] She contends that the defendant requested the kakahu for use at his daughter’s graduation from University and later admission to practise as a lawyer,

² *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

³ *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

and subsequently has failed or refused to return them despite her demands. She says that he has committed the tort of detinue, and seeks an order that he return the kakahu to her.

The application before the Court

[14] The defendant has applied to strike out the plaintiff's claim on the ground that it does not disclose a reasonably arguable cause of action. Although the defendant contended that the kakahu had been bequeathed to him and Te Raraku jointly in the wills of Tame and Pirihira and that he became sole owner on Te Raraku's death, he accepted (at least for the purposes of the present application) that the kakahu had been passed down to the plaintiff in accordance with Maori custom. He did not pursue an argument based on ownership, nor challenge the plaintiff's claim to possession based on Maori custom (again, for the purposes of this application). Rather, he says that at the time that he obtained them from her, the Protected Objects Act 1975 ("the Act") applied to displace or suspend all previous rights until they are determined by the Maori Land Court.

[15] In the alternative the defendant contends that the claim should be struck out on the basis that it is frivolous, vexatious and an abuse of Court process as the order sought would render the provisions of the Act nugatory.

[16] The plaintiff says that she has a well founded claim in detinue and that the facts as pleaded, and as attested to in affidavits and not in dispute, give rise to an arguable right to possession and a wrongful denial of those rights. She contends that this is a dispute between known claimants and that the Act does not apply.

[17] The application turns, accordingly, on whether the Act applies on the facts of this case. The defendant contends that it does because the taonga were "found" in terms of the definition of the Act when they were passed to him. The plaintiff says that the Act does not apply to objects passing between whanau members.

The Protected Objects Act 1975

[18] The Act was first passed as the Antiquities Act 1975. Its purpose was stated to be:⁴

...to provide for the better protection of antiquities, to establish and record the ownership of Maori artefacts and to control the sale of artefacts within New Zealand.

[19] When he introduced the bill into Parliament, the Minister of Internal Affairs at the time, the Hon. H L May, stated that the legislation was needed to safeguard against the export of Maori artefacts, which were viewed as the property of New Zealand as a whole and of significance for national identity.⁵ The parliamentary debates on the Antiquities Act, in addition to identifying a need to provide safeguards against export of Maori artefacts, also identified a concern to protect them within the domestic context:⁶

We do not want to protect artefacts only against export, but also against destruction within our own country, sometimes thoughtlessly, sometimes by people just souvineering, and sometimes by people who do not even understand what they are destroying....

[20] In summary, the purposes of the Antiquities Act in respect of artefacts was to restrict their export, and to record ownership and control sale in certain defined circumstances, with an underlying intention of protecting New Zealand's cultural heritage as part of the development of a national identity.

[21] The Antiquities Act was amended and renamed as the Protected Objects Act 1975 by the Protected Objects Amendment Act 2006. The 2006 Amendment Act was passed to address short-comings in the Antiquities Act and to bring New Zealand into line with international conventions concerning illicit trade in antiquities.⁷ This purpose is made plain by s 1A of the Act:

⁴ Long title to Antiquities Act 1975.

⁵ (2 August 1974) 393 NZPD 3458 at 3491 and 3463; (26 June 1975) 404 NZPD 2539 at 2540 and 2548.

⁶ See the speech of the Right Hon. N E Kirk at (2 August 1974) 393 NZPD 3458 at 3460.

⁷ See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 823 UNTS 231 (opened for signature 14 November 1970, entered into force 24 April 1972); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995).

1A Purpose

The purpose of this Act is to provide for the better protection of certain objects by—

- (a) regulating the export of protected New Zealand objects; and
- (b) prohibiting the import of unlawfully exported protected foreign objects and stolen protected foreign objects; and
- (c) providing for the return of unlawfully exported protected foreign objects and stolen protected foreign objects; and
- (d) providing compensation, in certain circumstances, for the return of unlawfully exported protected foreign objects; and
- (e) enabling New Zealand's participation in—
 - (i) the UNESCO Convention; and
 - (ii) the UNIDROIT Convention; and
- (f) establishing and recording the ownership of ngā taonga tūturu; and
- (g) controlling the sale of ngā taonga tūturu within New Zealand.

[22] The short-comings in the Antiquities Act that were identified concerned the lack of means to recover artefacts that had been illegally exported. In terms of adding protection to artefacts within New Zealand, the Hon. Judith Tizard, the Associate Minister for Arts, Culture and Heritage, made the following statement:⁸

Part 2 “Nga taonga tuturu ownership and the Maori Land Court”, is a relatively small part of this legislation... What we are doing here is trying to determine the ownership of found artefacts, not heirlooms or owned property. That issue would have to go to Court. But I have to say that I have had a number of questions from Maori constituents concerned, for example, about a situation whereby a family member who has custodianship – kaitiakitanga – of nga taonga tuku iho, has for example, changed religions and destroyed them. I am very pleased to see that under this legislation it will be an offence to destroy artefacts, but I think it is very much a family and legal issue and is not for the Crown to deal with in terms of found objects.

⁸ (25 July 2006) 632 NZPD 4377 at 4385.

Does the Protected Objects Act 1975 apply to the kakahu?

[23] It is common ground between the parties that the kakahu are taonga tūturu as defined by the Act.⁹ The issue on which this application turns is whether s 11 of the Act applies, and whether that displaces or suspends the right to possession that the plaintiff needs to establish to found a claim in detinue.¹⁰

[24] Relevant parts of s 11 read:

11 Establishing the ownership and custody of ngā taonga tūturu

- (1) Any taonga tūturu found anywhere in New Zealand or within the territorial waters of New Zealand after the commencement of this Act is hereby declared as deemed to be prima facie the property of the Crown:

Provided that where any taonga tūturu has been recovered from the grave of any person or persons whose identity is known the matter shall be referred to the Maori Land Court to determine who is the proper person or who are the proper persons to hold custody of the taonga tūturu.

- (2) Notwithstanding the provisions of subsection (1), if actual or traditional ownership, rightful possession, or custody of any taonga tūturu referred to in that subsection is subsequently claimed, the chief executive or any person who may have any right, title, estate, or interest in any such taonga tūturu may apply to the Maori Land Court to exercise any part of its jurisdiction under section 12:

Provided that no right, title, estate, or interest in any such taonga tūturu shall exist or be deemed to exist solely by virtue of ownership or occupation of the land from which the taonga tūturu was found or recovered.

- (3) Every person who, after the commencement of this Act, finds any taonga tūturu anywhere in New Zealand or within the territorial waters of New Zealand shall, within 28 days of finding the taonga tūturu, notify either the chief executive or the nearest public museum, which shall notify the chief executive, of the finding of the taonga tūturu.

Provided that in the case of any taonga tūturu found during the course of any archaeological investigation authorised by the New Zealand Historic Places Trust under section 44 of the Historic Places Act 1980, the notification shall be made within 28 days of the completion of the field work undertaken in connection with the investigation....

⁹ Protected Objects Act 1975, s 2.

¹⁰ To succeed in a claim to detinue a plaintiff must establish detention of the property in defiance of the rights of the person entitled to possession: see Cynthia Hawes “Interference with Goods” in Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Wellington, Brookers, 2009) at [12.4.01].

[25] The defendant's case is that the plaintiff is unable to establish a right to possession from the time that he received the kakahu, because at that point they were "found" in terms of the definition in the Act and any right to possession that she might be able to advance (whether pursuant to Maori custom, or if there was any factual basis for it, pursuant to inheritance) was displaced or suspended in favour of the Crown pending determination by the Maori Land Court of competing claims "to the actual or traditional ownership, rightful possession, or custody of any taonga tūturu, or to any rights, title, estate or interest therein".¹¹

[26] This argument turns on whether the kakahu, as acknowledged taonga tūturu, can be said to have been "found" for the purpose of s 11(1) of the Act.

[27] The defendant's argument is based on the definition of "found" in the Act:¹²

found, in relation to any taonga tūturu, means discovered or obtained in circumstances which do not indicate with reasonable certainty the lawful ownership of the taonga tūturu and which suggest that the taonga tūturu was last in the lawful possession of a person who at the time of finding is no longer alive; and *finding* and *finds* have corresponding meanings.

[28] In a carefully presented argument, counsel for the defendant submitted that the defendant "obtained" the kakahu in terms of this definition, when he received them from the plaintiff. She accepted that generally Parliament did not intend the Act to capture heirlooms,¹³ and that the Act was not intended to apply when taonga were passed down "a line of descent", but argued that a wide interpretation of "obtained" to include taonga which came into the possession of a person (even in a family circumstance such as this) was consistent with the purpose of the Act, the context of s 11, and a contemporary application of the Act.¹⁴ She submitted that such a purposive interpretation would best serve the protective measures of the Act to safeguard taonga. Counsel accepted that the defendant had agreed to relinquish possession in favour of Te Raraku but submitted that Te Raraku was the last person in lawful possession. She argued that the defendant obtained, and therefore found, the kakahu when they came back into his possession.

¹¹ Protected Objects Act, s 12(1)(b).

¹² Protected Objects Act, s 2.

¹³ (25 July 2006) 632 NZPD 4377 at 4385.

¹⁴ See s 6 of the Interpretation Act 1999, which states that enactments are to apply to circumstances as they arise.

[29] I do not accept that Parliament intended the Act to apply to disputes between members of whanau over taonga that have always been in the possession of one or another member of the whanau. It stretches the meaning of “found” beyond its natural meaning to interpret “obtained” without regard to the preceding word “discovered” so that it applies to a simple passing of possession. I do not intend to attempt to define the boundaries to the expression “discovered or obtained” on this application to strike out, but consider that it has to be interpreted in keeping with the succeeding words of the definition and exclude situations where there is a known history of ownership and possession.

[30] Counsel for the defendant argued that a distinction could be drawn in the case of a taonga that passed out of the possession of the person who was the lawful owner into the possession of another. She argued that it was consistent with the purposes of the Act to regard a taonga as having been found when it came back into the hands of the true owner. That will be a possible consideration in the determination of the claim for detinue. I do not regard it as bringing the circumstances clearly within the purposes of the Act so as to deny the applicant her right to have her claim heard. In that respect I take into account the remarks of the Minister introducing the amendment Act that “found” was not intended to apply in to disputes between whanau members, even where there was a concern about the protection of the taonga.

[31] Counsel for the defendant also submitted that the defendant’s interpretation of “found” as applying between family members was supported by s 13 of the Act which provided that taonga may only be disposed of to a registered collector. That section is in a different part of the Act to s 11. It deals with a discrete topic and, significantly, is subject to a proviso that expressly allows for the disposition of taonga to relatives whether by way of a gift inter vivos, pursuant to a testamentary disposition, under the intestacy of that person or by survivorship. Thus, rather than assisting the applicant, this provision further supports the view that the Act was not intended to apply to the movement of taonga amongst whanau members.

Decision

[32] I am not persuaded that the plaintiff's claim does not disclose a reasonably arguable cause of action. On the same reasoning it cannot be said that the claim is vexatious, frivolous or an abuse of process.

[33] The defendant's application to strike out is dismissed.

[34] As the successful party, the plaintiff is entitled to her costs of defending the application, on a scale 2B basis, together with disbursements as fixed by the Registrar.


Associate Judge Abbott