

Tikanga and the High Court: *Bamber v Official Assignee*

[2023] NZHC 260 [23 February 2023]

Following the Supreme Court's decision in *Ellis*¹ questions have been raised regarding the extent to which tikanga should be applied by the Courts. Recently the High Court considered this issue in an insolvency context.

Bamber v the Official Assignee [2023] NZHC 260 is an appeal of a decision of the District Court in which Kaiwhakawā Spear ordered that ngā kaikaro (the Defendants), who had been adjudicated bankrupt prior to the proceeding, vacate their property which had vested in the Official Assignee as a result of their bankruptcy, pursuant to section 152(2) of the Insolvency Act 2006² (the Act).

The debt leading to the bankruptcy of ngā kaikaro occurred as a result of a litigation relating to Māori Land. However, the section 152(2) order was made in relation to general freehold property unrelated to the Māori Land which was the subject of the earlier dispute.

In the District Court Kaiwhakawā Spear held that there had been ample opportunity for ngā kaikaro to meet with their creditors to try and resolve the issues. His Honour specifically noted that:

"I do not consider that there is any reason, either by consideration of Tikanga Māori principles or not, for the Official Assignee to be denied an order against Mr and Mrs Bamber for possession of their property".³

The issue on appeal to the High Court was whether tikanga was relevant to the orders issued under section 152 of the Act. The appeal consisted of two grounds:

1. whether kaumatua and ngā kaipira (the appellants) should have been allowed to speak to their affidavit evidence provided at the District Court hearing; and
2. that ngā kaipira should not be removed from what had been their papakāinga in order to satisfy a debt owed.

On appeal, Kaiwhakawā Harvey upheld the judgment of Kaiwhakawā Spear and dismissed the appeal.

Kaiwhakawā Harvey's review of the District Court's application of tikanga provides some insight into the application of tikanga in insolvency disputes. His Honour stated that while it might have been preferable to have kaumatua and Ms Bamber speak to the affidavit evidence at the District Court hearing, Kaiwhakawā Spear was within his authority to determine the procedure for the case. His Honour also was not convinced that any additional oral evidence on tikanga would have made a material difference to the outcome. He noted that the written submissions on tikanga addressed rangitira, co-operation, partnership and the appellants "unqualified exercise of her paramount author regarding her housing situation". Kaiwhakawā Harvey noted that those terms were more commonly applied in Te Tiriti context as opposed to bankruptcy proceedings or tikanga.

Kaiwhakawā Harvey delved further into the tikanga implications of this case noting that even if ngā kaipira were a member of the various iwi and hapū of the area, this would not defeat section 152 of the Insolvency Act and, tikanga cannot be applied to override the applicable statute. This is because of the procedural nature of section 152(2) of the Act which allows the Official Assignee to secure property for the benefit of a creditor who, in this case, is a Māori Land trust.

However, Kaiwhakawā Harvey commented that tikanga

¹ *Ellis v R* [2022] NZSC 115.

² *Official Assignee v Bamber* [2022] NZDC 13038

³ At [17].

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was especially relevant when ngā kaipira had the opportunity to discuss the debt with their creditors being, both before and after the Māori Land Court proceedings and, prior to any bankruptcy proceeding. However, ngā kaipira, for their own reasons, instead choose to continue with litigation.

Finally, in his closing comments, Kaiwhakawā Harvey appealed to the creditor's own understandings of tikanga despite the creditor not being a part of the proceeding. He suggested that perhaps, the outcome that would be most consistent with tikanga would be for the creditor to reach an agreement with the kaipira via the Assignee. In his Honour's view this would be consistent with the principles of whanaungatanga, manaakitanga, hara, muru, utu and ea,

So where does this leave tikanga in insolvency? The approach in this case was held to be consistent with that taken in *Ellis*, where it was held that:

[t]he Court is unanimous that tikanga has an will continued to be recognised in the development of Aotearoa/New Zealand in the cases where it is relevant.⁴

It was also confirmed in *Ellis* that consideration of tikanga will not always be relevant or necessary where tikanga cannot assist.⁵

It appears that, at this stage, unless there are specific circumstances which give rise for the need for tikanga to be applied, it will be will not override the procedural steps in the insolvency process.

However, it is important to keep in mind Kaiwhakawā Harvey's comments on the application of tikanga when there are opportunities for mediation or discussion between creditor and debtor and that perhaps, there is room, when possible, for tikanga to apply in insolvency.

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⁴ Above n1, at [19].

⁵ At [117].