I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI
In the Māori Appellate Court of New Zealand
Waiariki District

A20190008137
APPEAL 2019/13

WĀHANGA *Under*	Section 58 of Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Awanui Haparapara No 2B No 1B Sec 2 Block
I WAENGA I A *Between*	ALEXANDRA TERE INSLEY Te kaitono *Applicant*
ME *And*	MICHAEL INSLEY, SHANNON PAYNE, BRONWYN NGATAI and GAYLE NGATAI as trustees of AWANUI HAPARAPARA 2B1B2 AHU WHENUA TRUST Ngā kaiurupare *Respondents*

Nohoanga: *Hearing*	On the papers
Kooti: *Court*	Chief Judge W W Isaac (Presiding) Judge P J Savage Judge S Te A Milroy
Kanohi kitea: *Appearances*	Mr C Bidois for the appellant Mr L Hemi for the respondents
Whakataunga: *Judgment date*	12 February 2020

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei timatanga kōrero – Introduction

[1] On 12 September 2019, Alexandra Tere Insley (the appellant) filed an appeal against a decision of the Māori Land Court dated 5 December 2018 refusing to grant an occupation order to her mother, Rarua Alice Insley.[1]

[2] In that decision, Judge Coxhead dismissed the application as the trustees of the Awanui Haparapara 2B1B2 Ahu Whenua trust (the trust) had not consented to the occupation order on the land they administer.

[3] By telephone conference on 31 January 2020, we refused to grant leave to appeal out of time, vacated the hearing of the appeal and dismissed the application. This decision sets out our reasons for doing so.

Kōrero whānui – Background

[4] Awanui Haparapara No 2B 1B Section 2 (the land) is Māori freehold land; currently there are 52 owners in the land with a total shareholding of 8.1125 shares. The trust over the land is governed by five trustees, Wharehaua Butler, Michael Insley, Bronwyn Ngatai, Gayle Ngatai and Shannon Payne.

[5] The applicant in the lower Court sought an occupation order in favour of her and her seven children over an area adjacent to their existing whānau home. Michael Insley, son of the lower Court applicant and brother of the appellant, opposed the application. The trustees of the trust also opposed the application. Michael submitted that the occupation order would limit his rights in the land, he also objected to being included in the occupation order and having his share in the house included in the occupation order. As well as being unwilling to be involved in ongoing problems within the Insley whānau, the remaining trustees refused their consent as the proposed beneficiaries of the occupation order already had homes and occupation orders on or near the land.

[6] Judge Coxhead found he had no jurisdiction under s 328 to grant the orders sought without trustee consent. He noted in his decision that even if the trustees had consented to

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1 *Insley v Insley – Awanui Haparapara No 2B No 1B Section 2* (2018) 202 Waiariki MB 187-195 (202 WAR 187-195).

the order, it was unclear whether any owners outside of the Insley whānau supported the application.

Ngā kōrero a te kaitono pīra – Submissions of the appellant

On leave to appeal out of time

[7] The appellant sought leave to appeal out of time on the basis that the parties were encouraged by the Court and advised by previous counsel to try to resolve matters. The appellant stated that she was unaware of the two-month deadline for filing an appeal and therefore did not file until the conversations with the trustees failed. Ms Insley did not believe her then counsel raised the issue of the filing deadline.

[8] Therefore, the appellant did not pursue her appeal rights immediately and instead made attempts to resolve issues with the Trustees.

[9] It was submitted that the appellant was unaware that the trustees were not going to support the application in the lower Court until that hearing was held. Previously, the trustees had indicated that they would support the occupation order. Due to this change in stance, the applicant and her mother were not properly prepared, and the appellant submitted it is in the interests of justice that they now be allowed to properly prepare and have the merits of their case heard.

[10] Counsel for the appellant also submitted that his client should not be unfairly penalised for pursuing a non-adversarial outcome, particularly on the advice of the Court.

[11] Counsel submitted that to allow the appeal out of time would not prejudice the trustees, who have no current plans for the land, nor would it inconvenience anyone for the current occupiers of the house to remain there while an outcome is determined.

On the substantive issue

[12] The appellant sought that the lower Court decision be set aside, and the matter be heard afresh.

[13] Counsel submitted that the trustees' resolution to remove their support for the occupation was unreliable as Michael Insley is an interested party under s 227A of Te Ture Whenua Māori Act 1993 (the Act). The resolution ought to have been set aside by the Court in accordance with the common law set out in the 2019 decision of the Māori Appellate Court in *Pook v Matchitt*.[2] Minutes of the trustee meeting show Michael participating in the discussion and the resolution despite his relationship with the applicant.

[14] The appellant alleged that, in reliance on the trustees' original consent, the appellant and her mother were put to the expense of a survey. Counsel submitted that leave would be sought to produce evidence of this expense to the Appellate Court and that the argument concerning Michael Insley's involvement in the resolution to rescind the trustees' support for the occupation order has merit that ought to be explored.

Ngā kōrero a ngā kaiurupare – Submissions of the respondents

On delay

[15] The Respondents opposed the application for leave to appeal out of time. They submitted that the following considerations adopted by the Māori Appellate Court were relevant in determining whether to grant leave: (a) the prospective merits of the appeal; (b) the conduct of the parties; (c) prejudice arising from the delay; (d) the length of delay and the reason for it; and (e) whether the appeal is a public interest matter.[3] The core consideration, it was submitted, is where the interests of justice lie.

[16] Counsel for the respondents submitted it was highly unlikely that former counsel for the appellant did not note the possibility of an appeal and, therefore, the deadline for filing. Alternatively, negotiating with or trying to resolve matters with the trustees was determined by counsel to be the best course of action instead of pursuing any rights under appeal.

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2 *Pook v Matchitt – Matangareka 3B* [2019] Māori Appellate Court MB 167 (2019 APPEAL 167).

3 *Matchitt v Matchitt – Te Kaha 65* [2015] Māori Appellate Court MB 433 (2015 APPEAL 433); *Nicholls v Nicholls – Part Papaaroha 6B block* [2013] Māori Appellate Court MB 636 (2013 APPEAL 636); *Davis v Mihaere – Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641).

[17] The respondents noted that an appeal was still not filed when the appellant engaged new counsel sometime in 2019. The appellant instead chose first to pursue an application for rehearing, which was also filed outside of the respective deadline. As, at all stages, the appellant had the benefit of legal counsel, the respondent submitted that it is unlikely the possibility of an appeal was not raised or discussed with the appellant and therefore, that option must have been rejected.

[18] The delay in filing is around seven months which was submitted to be a significant amount of time and certainly more than the statutory timeline of two months.

[19] Counsel did not believe the appellant's reasons could be considered extraordinary circumstances warranting the grant of leave but suggested the appellant was seeking another bite of the cherry following failure to reach a negotiated outcome or to obtain a rehearing.

[20] The respondents denied that the appellant was not made aware of the withdrawal of their consent for the occupation order so that the appellant was "ambushed" in the lower Court and could not properly defend the hearing. In fact, briefs of evidence were served on the lower Court applicant and her counsel six days prior to the hearing, which was the earliest possible opportunity. Counsel submitted that any issues arising from this late service should have been dealt with by requesting the Court to adjourn the hearing to a later date. Regardless, service did occur, and the appellant cannot now suggest it is in the interests of justice to allow further evidence to be filed or arguments to be made on the basis of lack of notice.

[21] Counsel for the respondents submitted that granting leave to appeal on the basis of the evidence sought to be adduced by the appellant, would be contrary to the principles of finality and timely administration of justice, because the evidence was or should have been made available to the lower Court.

[22] On prejudice, Counsel submitted that the appeal had prevented the trust from carrying on its usual business for some 12 months and is preventing the determination of a separate application for occupation order by another beneficiary of the land. It was also noted that the appellant could submit a new application for occupation to the trust and as such, the

appellant and her mother have ongoing rights that would not be limited if this appeal were not granted.

On the merits

[23] The respondents submitted that the appeal was without any merit that would warrant it being heard. Counsel noted that s 227A does not properly apply to these circumstances, although it does speak to wider trustee duties. More importantly, it was submitted that the fresh evidence referred to by the appellant was or should have been available to the lower Court and therefore there is no merit to the appeal.

Te ture – Law

[24] Section 58 of the Act grants the Māori Appellate Court the discretion to hear an appeal filed out of time although that discretion is subject to the limits set out in rr 8.14 and 8.20 of the Māori Land Court Rules 2011.

[25] This Court recently considered the issue of an appeal out of time and adopted the reasoning of the Supreme Court in *Almond v Read*:[4]

> Rule 8.14 is similar in its principles to r 29A of the Court of Appeal (Civil) Rules 2005 (the COA Rules). The principles on which that rule is to be applied have recently been summarised by the Supreme Court.
>
> (a) There is a right to a first appeal. There is no explicit power to strike out timely appeals summarily on their merits. This is important background against which extension applications must be determined.
>
> (b) Where there has been a minor slip up of an appeal right, that should not necessarily entitle the Court to look closely at the merits of the proposed appeal. In those circumstances, an extension of time should generally be granted.
>
> (c) The ultimate question is what the interests of justice require, requiring an assessment of the particular circumstances of the case. Factors to consider include the length of delay and the reasons for it, the conduct of the parties (particularly the applicant), any hardship to the respondent or others with a legitimate interest in the outcome and the significance of the issues raised by the proposed appeal.

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4 *Ngakoti v Department of Conservation – Ngaiotonga A3* [2019] Māori Appellate Court MB 213 (2019 APPEAL 213); *Almond v Read* [2017] NZSC 80.

(d) The merits of a proposed appeal may, in principle, be relevant to the exercise of the discretion to extend time, subject to the certain qualifications. One such qualification is that decision to refuse an extension of time in this context should only be made if the appeal is "clearly hopeless", for example if it could not possibly succeed. Lack of merit must be "readily apparent, and the discretion should not be used as a mechanism to dismiss "apparently weak appeals summarily".

[26] We adopt these same principles.

Ngā take - Issues

[27] The issues for consideration are:

(a) Has there been a mere slip?

(b) Does the appeal have merit?

(c) What do the interests of justice require?

Kōrerorero – Discussion

Mere slip

[28] This appeal was filed seven months out of time. At the time the lower Court matter was heard and for perhaps some weeks before the appeal was filed, the appellant had the assistance of legal counsel. In addition, the appellant and her whānau are no strangers to the Māori Land Court, having filed or been party to matters related to this and other land over the course of some years now.

[29] The appellant submitted that her former counsel did not raise the possibility of an appeal with them. In addition, she stated that her former counsel recommended that she undertake to negotiate a suitable outcome as suggested by Judge Coxhead. By this submission, the appellant requested that the delay in filing be overlooked as the whānau were attempting to comply with the lower Court's recommendation.

[30] The appellant went on to submit that the respondents' conduct should count against them as they refused to constructively engage in those discussions.

[31] It appears unlikely to us that the appellant's right to appeal was not considered, in light of her access to counsel and her experience with the Court. Although the appellant can be commended for seeking a negotiated outcome suitable to all parties, this does not excuse the lateness of the filing. We do not consider ignorance of the appeal deadlines a reasonable submission and find this delay cannot be considered a mere slip.

The interests of justice

[32] The delay in filing was significant and, as we stated, not properly justified. We accept the submission of the respondents, that the appellant is not prevented from seeking a further occupation order. The failure of this appeal will not unduly limit the appellant's ongoing rights to use and enjoy the land. These factors weigh against the grant of leave to appeal out of time.

[33] The conduct of the parties is also a consideration and we accept that the appellant sought to enter discussions with the trustees and come to an outcome that would be suitable to everyone involved.

[34] These matters are relevant, but not determinative to the outcome. We now consider the merits of the appeal.

Merit

[35] Counsel for the respondents submitted that the appeal lacked any merit as there was no fresh evidence that could or should be referred to the Court and because s 227A does not directly apply to occupation orders.

[36] The appellant conceded there was no "ambush" in the lower Court and withdrew the submission. However, the appellant maintained that Michael Insley is an interested trustee per s 227A and should not have participated in discussions regarding the occupation order.

[37] While the point on interested trustees may have general merit, we cannot reasonably find that the appeal has any useful purpose.

[38] Section 328 of the Act empowers the Māori Land Court to grant occupation orders, but the discretion of the Court is clearly limited by s 328(2):

> the court shall not make the order without the consent of the trustees or of the management committee of the incorporation, as the case may require.

[39] The transcript of the lower Court hearing showed that three of the five trustees gave evidence of their opposition to the application.[5] We note that even setting aside Michael Insley, this still constitutes the majority of trustees refusing, in open court, to give their consent. Bronwyn Ngatai and Gayle Ngatai spoke of ensuring there was enough land for all families who whakapapa to it to be able to live there. They also spoke of how the ongoing tension between the Insley children had affected all owners in the block. Wharehaua Butler was represented by his wife Margaret. Mrs Butler stated that when her husband sought an occupation order and to build on the land, the Insley whānau strongly opposed him.

[40] The consent of the trustees is a mandatory requirement when the land is governed by an ahu whenua trust. Judge Coxhead had no power to disregard the trustees' refusal to consent. The appeal is therefore misconceived, because even if the Court went so far as to accept that Michael Insley was an interested trustee and should not have taken part in the discussions concerning the occupation order, the Court is still unable to grant the occupation order or substitute its own view for that of the trustees.

[41] We consider, therefore, that this appeal was "clearly hopeless" and meets the requirement for summary dismissal.[6]

Whakataunga – Decision

[42] Although there is a right to appeal and even apparently weak appeals should be heard by the Court, this appeal falls into the narrow category of those which are clearly hopeless. We are mindful that such a dismissal by the Court should be rare and carefully considered.

[43] The application for leave to appeal out of time is refused and this appeal is dismissed.

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[5] 193 Waiariki MB 99-116 (93 WAR 99-116).
[6] *Almond v Read* [2017] NZSC 80 at [39].

[44] We have considered whether to seek submissions as to costs, but on further reflection, and in light of the fact that the parties are whanaunga or involved in the same block of land, we have determined that costs will not be awarded

I whakapuaki i te 2.00pm i Te Whanganui-a-Tara te 12 o ngā rā o Pēpuere te tau 2020

W W Isaac	P J Savage	S Te A Milroy
CHIEF JUDGE	**JUDGE**	**JUDGE**