

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO MANIAPOTO**

A20130008284

A20130008285

UNDER Section 58, Te Ture Whenua Māori Act 1993

IN THE MATTER OF WT Nicholls Trust – an appeal against an order of the Māori Land Court made on 15 August 2011 at 27 Waikato Maniapoto MB 107-169

AND
IN THE MATTER OF W T Nicholls Trust – an appeal against an order of the Māori Land Court made on 17 October 2012 at 49 Waikato Maniapoto MB 112-155

BETWEEN GEORGE TAMA NICHOLLS
Appellant

AND MARK STEVEN NICHOLLS, AIRINI
PIRIHIRA TUKERANGI, DELACE WILLIAM
JAMES, KAHUTOROA MATAIA
TUKERANGI, VIV TAMA NICHOLLS,
ANITA MARI NORMAN, AND SARAH JANE
NICHOLLS as Trustees of the W T NICHOLLS
TRUST
Respondents

Coram: Deputy Chief Judge Fox (Presiding)
Judge S F Reeves
Judge M J Doogan

Appearances: Mr John Kahukiwa and Ms Takitimu for the Appellant.
Mr Wackrow and Ms Gray, for the Respondents.

Judgment: 23 December 2013

**DETERMINATION OF THE MĀORI APPELLATE COURT ON AN
APPLICATION TO APPEAL OUT OF TIME**

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Introduction

[1] On 9 September 2013, George Nicholls filed an appeal against orders made by Judge Milroy in the Māori Land Court. The first orders were made on 15 August 2011 pursuant to ss 215, 219, 220 and 222 of Te Ture Whenua Māori Act 1993 (“the Act”).¹ The second orders were made on 17 October 2012.² An application for leave to appeal out of time was also filed on 11 September 2013.

[2] On 25 September 2013, Chief Judge Isaac appointed this Coram to hear the application for leave to appeal out of time and the applicant was directed to deposit \$750.00 as security for costs.

[3] On 26 September 2013, the respondents, Mr Mark Steven Nicholls and other Trustees, through counsel filed a memorandum and notice of intention to appear in opposition to the notice of appeal.

[4] On 18 November 2013, this Court issued directions regarding the application for leave to appeal of time. The Court noted that the notice of appeal had been filed well outside the time required under s 58(3) of the Act. Counsel for the applicant concedes that on a strict application of s 58(3) his ability to appeal as of right ran out on 15 October 2011 (in relation to the first orders), and on 17 December 2012 (as to the second orders).

[5] In its direction of 18 November 2013, the Court also noted that by virtue of r 8.14(4) of the Māori Land Court Rules 2011 (“the Rules”), the Māori Appellate Court may deal with the application in accordance with the procedure set out in r 8.20. We determined that a formal hearing was not necessary and we advised the parties to file submissions supporting or opposing the application for leave to appeal out of time. Mr Kahukiwa filed submissions on 2 December 2013. Mr Wackrow filed in reply on the 16 December 2013. Mr Kahukiwa advised the Court on 23 December 2013 that the respondents had raised nothing new that warranted the excuse of the right of reply granted to his client. We note that enclosed with the submissions filed by Mr Wackrow was an affidavit of Mark Stevens dated 13 November 2013. We have not considered it necessary to refer to that affidavit.

¹ 27 Waikato Maniapoto MB 107-169 (27 WMN 107-169).

² 49 Waikato Maniapoto MB 112-140 (49 WMN 112-140).

[6] The Māori Appellate Court has since convened by teleconference for the purpose of dealing with the application.

Orders Complained Of

[7] The orders complained of relate to the constitution of the W T Nicholls Ahu Whenua Trust (“the Trust”) and the vesting of certain lands in the Trustees of the Trust.

[8] On 15 August 2011, Judge Milroy issued interim orders constituting the Trust.³ At the court hearing Judge Milroy heard from George Tama Nicholls who objected to the constitution of the Trust. Judge Milroy also issued directions concerning the administration and financial reporting of the properties over which the Trust was constituted.

[9] On 17 October 2012, a review of the Trust was held.⁴ At the conclusion of the hearing Judge Milroy made orders varying the terms of the Trust to provide for the permanent constitution of the Trust and confirming the appointment of the Trustees.

Grounds for Seeking Leave to Appeal Out of Time

[10] Mr Kahukiwa for the applicant, provided the initial grounds upon which leave to appeal out of time was sought. These grounds may be summarised as follows:

- a) During the course of appeal proceedings concerning an injunction the applicant and his legal team determined that an appeal should be entered against the orders of the Court constituting the interim ahu whenua trust, vesting the lands in the Trust and the subsequent confirmation orders;
- b) At the time the orders were made the applicant was unrepresented. The applicant now has representation however, much of their time has been spent dealing with the injunction proceedings;
- c) The prejudice to the applicant will outweigh the prejudice to any other party if leave to hear the appeal is not granted;

³ Above n 1.

⁴ Above n 2.

- d) The constitution of the Trust has been used as the basis for permanent injunction proceedings against the applicant preventing him from entering onto his ancestral land and preventing him from fulfilling his duties as administrator;
- e) The vesting of the lands in the Trust constituted an illegality given the appointment of the applicant as administrator of his father's estate by the High Court. The applicant should have the right to test that proposition; and
- f) In order to resolve all the matters fully the original orders need to be unpacked.

Opposition to Leave to Appeal Out of Time

[11] Mr Wackrow for the respondent Trustees submitted that:

- a) The notice of appeal is well outside the time required per s 58(3). The orders are in excess of 22 months and 8 months respectively out of time. The applicant has been legally represented for at least 12 months. No sufficient explanation has been given for the applicant's failure to file within time. There are no meritorious grounds for the appeal and no issues of public importance. The interests of justice favour the respondents;
- b) The learned Judge was entitled to come to all decisions made. She did not act on a wrong principle, make an error in law or take into account irrelevant matters or omit to take into account relevant matters or make a decision which was plainly wrong.

Relevant Law

[12] We note that although the Māori Appellate Court does have a discretion to grant an application for leave to appeal out of time, it has always been incumbent upon the applicant to bring such proceedings before the Court as soon as possible after becoming aware of the terms of an order.⁵

⁵ *Heni Jean Ross v Trustees of Part Rangatira E Block 5* (1998) 1 Waiāriki Appellate Court MB 111 (1 AP 111).

[13] In general, a question of reasonableness weighed against the requirement of finality is the initial consideration on such applications. The overall interests of justice is the decisive factor. There are a number of decisions concerning leave to appeal out of time where leave has been granted.⁶ Where applicants have filed their appeal a few days out of time, or can plausibly show that they did not become aware of the order appealed from until after the two-month deadline had passed and were otherwise swift in filing their appeal, leave to appeal out of time has generally been granted. Where the delay in filing an appeal has been more than a few days or weeks, and the applicant can show no reasonable cause for this delay, leave has generally not been granted.

[14] In *Heni Jean Ross v Trustees of Part Rangatira E Block 5* (“*Part Rangatira E Block 5*”)⁷ for example, the Court considered an order made on 9 December 1997 to change the status of a block of Māori freehold land to general land. The applicant for leave was a shareholder in the Rangatira E Trust and had no knowledge of the proceedings leading to the making of the order. Indeed, the existence of that order was not brought to her attention until 4 March 1998. She did not file a notice of appeal until 13 October 1998, over 10 months from the date of the minute of the order appealed from. Noting the decision in *Fisher and Paykel Ltd v Commerce Commission*⁸ the Māori Appellate Court quoted from it as follows:

As a general principle affecting the exercise of the discretion, in matters concerning continuing commercial practices and ongoing business arrangements, it is important both in the interest of the parties and in the general public interest that any application for leave be made reasonably promptly. A delay as long as six months is a factor telling against the discretion, although not in itself decisive.

[15] Using this authority the Māori Appellate Court held that having regard to the inordinately long period of time which had elapsed since Mrs Ross learned of the order in March 1998, leave should be refused.

⁶ See *Muraahi v Phillips – Rangitoto Tuhua 55B1B and 55B1A2* (Manu Arika Marae) 2012 Māori Appellate Court MB 568 (2012 APPEAL 568); *Mann – Pakohu 2B2AJ* (2000) 4 Taitokerau Appellate Court MB 234 (4 APWH 234); *Mangu – Motatai 1B3E2*(1999) 4 Taitokerau Appellate Court MB 198 (4 APWH 198) for situations where leave has been granted.

⁷ Above n 5.

⁸ [1991] 1 NZLR 570.

[16] In 2009, the Acting Chief Judge applied the *Part Rangatira E Block 5* decision to decline leave to appeal in *Te Kotuhi Rogers – Te Aute AIA*⁹ for an appeal that was lodged over five years out of time. The grounds sought for leave to be granted were that the applicant was not advised of the order appealed from until 21 June 2006, despite the order being made on 22 January 2004. It was also contended that the delay after 2006 was due to numerous trips to the Taitokerau Māori Land Court to collect documents relating to the appeal. The Acting Chief Judge found that this did not justify such an extended delay in the filing of the appeal and declined leave.

[17] In a more recent case concerning an appeal from a preliminary determination, the Māori Appellate Court in *Davis v Mihaere – Torere Reserves Trust*¹⁰ found that the length of delay, covering a period of just over three months, was not insignificant. The Court considered relevant to its decision authorities from the Court of Appeal that determined such applications by reference to the following factors:

- (a) The conduct of the parties;
- (b) Any prejudice - and in this respect the Court noted that the delay in filing the appeal created some uncertainty and confusion for the Trust and its beneficiaries and was linked to the failure of the applicants to win nomination for appointment of Trustees at a meeting required by the Court;
- (c) The merits of the appeal which were limited;
- (d) Whether the matter raised any issues of public importance and it did not;
- (e) Whether it was in the “interest of justice” to grant the application for leave to file out of time and in the context of the case it was not.

[18] This list of considerations was drawn from the decisions:

- (a) *Robertson v Gilbert* [2010] NZCA 429 where the Court of Appeal stated:

[21] By r 29(1) of the Court of Appeal (Civil) Rules 2005 a party must bring an appeal (that is as of right) within 20 days of the decision appealed against. This appeal is clearly hopelessly out of time, even for the 2007 judgment.

...

⁹ (2009) 2009 Chief Judge’s MB 188 (2009 CJ 188).

¹⁰ [2012] Māori Appellate Court MB 641 (2012 APPEAL 641).

[23] But in law, a party who fails to file an appeal within 20 days of the decision appealed against has to apply for an extension of time to appeal under r 29 A. If that application is opposed, as this one is, then the application effectively becomes one for leave to appeal.

[24] As confirmed recently by this Court in *My Noodle Ltd v Queenstown-Lakes District Council* and in *Barber v Cottle* the overarching consideration in determining whether to grant an extension is where the interests of justice lie. This is a long-standing and settled principle. Relevant considerations assisting in that inquiry are the length of delay, the reasons for the delay, the parties' conduct, the extent of prejudice caused by the delay, and the prospective merits of the appeal. Leave will be declined where the appeal has no legs. But the interests of justice may require that leave be granted, not necessarily simply because the merits appear strong, but where there is insufficient material before the Court to exclude the possibility that there is merit.

[25] At face value, there appears to be conflicting authority as to the relevance of the public importance of proposed appeals in determining applications such as this. In *Barber v Cottle* it was said to be a relevant consideration. In *My Noodle Ltd* however, the Court distinguished applications for extensions of time from applications for special leave, with the consequence that the public importance of the proposed appeal was not a point for particular emphasis. In practice this confusion may well arise out of the fact that many applications for special leave are made out of time and so the separate jurisdictions coincide to a degree. In any event, this is not a "public importance" case; it involves the resolution of a private law property dispute on settled principles.

(b) *Pearce v Pearce*¹¹ where the same Court stated

Should an extension of time to appeal be granted?

[14] The discretion to grant an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules is wide and flexible but will not lightly be exercised. The overarching question is whether the interests of justice warrant the grant of an extension. Relevant considerations include the length of the delay and the reasons for it; the conduct of the parties; the extent of any prejudice caused by the delay; the intrinsic merits of the appeal; and whether the appeal raises any issue of public importance.

[19] What these authorities stress is that the "interests of justice" is the primary determinative factor. Several factors including the length of and reasons for the delay, the strength of the proposed appeal, society's interest in the finality of litigation, the difficulty

¹¹ *Pearce v Pearce* [2012] NZCA 378.

inherent in conducting any re-trial after a lengthy delay and the effect of a re-trial upon individuals involved in the litigation are all matters that should be taken into account.

Case for the Parties

[20] Mr Kahukiwa contended that where the justice of this case falls should be informed by two key matters:

- (a) The matters set out in the Preamble, ss 2 and 17 to the Act. He contended that in determining whether this application should be granted, these principles and directives must be furthered, and not contravened or “run up against” in any exercise (or non-exercise) of the discretion that the applicant seeks to raise;
- (b) The “interests of justice”, including relevant considerations such as those listed above.

[21] Mr Wackrow framed the case for his clients on similar terms although reversed in priority. We adopt the same headings used in *Pearce v Pearce*. We then return to the overall schema of the Act.

The Overall Justice

The length of the delay and the reasons for it

[22] As this Court has already observed, the applicant was more than 22 months and 8 months out of time respectively when the notice of appeal and application for leave to appeal of time were filed. These are not insignificant time periods.

Submissions for the Applicant

[23] Mr Kahukiwa contended that these time delays should not be demonstrative of a mere delay on his client’s part or of an indication that he recently “changed his mind”. Instead he could show that his objection to the constitution of this Trust has been consistent and continuing and that the applicant’s objections have been shared from time to time by two of his uncles.

[24] He asked this Court to accept as material that during the time between the first and second orders sought to be appealed from, the applicant did not instruct counsel. Nor was he represented in hearings.

[25] The applicant has complained that he was “lulled” into provisionally accepting the temporary constitution of the Trust. This was so that the directions imposed by Judge Milroy on his relations to account for use of funds generated for the land be complied with. Mr Kahukiwa did concede however, that when this did not eventuate in the manner he envisaged, Mr Nicholls sought to withdraw his conditional acceptance, and rejuvenate his opposition to the second orders in open Court, just prior to them being made.

[26] It was also contended that since 17 December 2012, he has been engaged in a bitter and drawn out litigation which has focussed on his possession, rather than the Trust per se. It has been as a result of that litigation that the points of appeal emerged for this appeal. While the respondents have suggested that he should have brought an appeal earlier, Mr Kahukiwa argued that his client has only just arrived at a position to bring the claim. If this Court accepted that the applicant should have brought his appeal earlier, he opined, that would be tantamount to accepting that he does have a valid appeal.

Submissions for the Respondents

[27] Mr Wackrow submitted that in this case, the applicant is merely seeking to avoid and postpone the consequences of the Māori Land Court judgment and other related unsuccessful appeals. Essentially he contended that none of the grounds offered as the basis for the delays are valid.

[28] In particular, Mr Wackrow argued that his objections to the establishment of the Trust were heard by Judge Milroy, but his view was a minority view and the Court moved to make the orders complained of. The fact that some owners opposed the formation or constitution of the Trust can not constitute a reason for delays of this significance. Furthermore, no one else has filed an appeal concerning these orders. The fact that he was unrepresented or had not instructed counsel cannot constitute a valid reason for the delays either. It was his choice that he not be represented. That is to be compared to previous

litigation concerning these whānau lands heard in 2008 when he was represented by counsel.

[29] Likewise his complaint that he was “lulled” into accepting the constitution of the Trust cannot be a good enough reason. As to his final argument that if “delay” is used as the reason to deny this application, then the applicant must have a valid appeal, Mr Wackrow submitted that this cannot be the basis for delay. He reiterated that it was incumbent on the applicant to bring such proceedings before the Court as soon as possible.

Findings of the Court

[30] We accept Mr Wackrow’s submissions. We find that none of the matters that the applicant has raised adequately explain or justify the delays in bringing an appeal against the orders complained of.

[31] The applicant had been present in Court when all those orders were made. Thus, this case is not similar in facts to the *Part Rangatira E Block 5* case. He has no reasonable excuse for not taking action.

[32] Furthermore, and as in the *Davis v Mihaere* case, this Trust has been subject to significant upheaval due to the ongoing litigation involving the applicant. The Trust has been denied income from the commercial operation occupied by Mr Nicholls and his associates. It is not in the interests of justice to continue to subject the Trust to what are essentially delaying tactics by the applicant. The delays in this case have been significant. No steps were taken within the statutory period to bring appeals or to pursue the matter.¹² Rather he has waited until the order of the Lower Court for an injunction against him was transmitted to the High Court.

[33] There has been no valid reason or explanation provided concerning the delays.

¹² See *Muraahi v Phillips – Rangitoto Tuhua 551B and 55B1A2 (Manu Ariki Marae)* [2012] Māori Appellate Court MB 568.

The Parties Conduct

[34] In our “Reasons for Judgement” delivered on 22 November 2013¹³ concerning related proceedings, this Coram noted the applicant was a minor shareholder in the land. We also noted the circumstances surrounding the applicant’s occupation of the lands that are subject to the Trust created pursuant to the orders complained of. In particular we stated: ¹⁴

There was uncontroverted evidence that since assuming occupation in 2003, Mr Nicholls and his associates have used intimidation to force occupancy, that they have paid no rates or rent and there was a reasonable cause to infer that he has deprived the other owners of the income necessary to meet the rates and other debt liability on the land.

Submissions for the Applicant

[35] Mr Kahukiwa noted that the applicant has been consistent with his objection to the Trust being imposed on him but that he should not be criticised for standing up for what he believed in. He contended that there is no evidence of any “disentitling” conduct by the applicant.

Submissions for the Respondents

[36] It was contended for the Trustees that the notice of appeal and the application for leave to appeal out of time, have been filed to delay enforcement of the orders of injunction and for the recovery of land that were made in the Māori Land Court against the applicant. Mr Wackrow submitted that the applicant’s timing seeks to open a new front in his contest with the Trustees. Alternatively, it reflects a change of mind which equally tells against granting leave to appeal out of time.

Findings of the Court

[37] Again we accept the submissions of Mr Wackrow and find that the conduct of the applicant must weigh against him in this application. In our view his conduct is putting at

¹³ *Nicholls v W T Nicholls Trust – Part Papaaroha 6B Block* [2013] Māori Appellate Court MB 598 (2013 APPEAL 598).

¹⁴ *Ibid* at [111].

risk (a) the Trustees' ability to carry out their duties in respect of the Trust, and (b) the Trust property.

[38] The inference we draw from his conduct is that he is using litigation at this late stage as a means to avoid enforcement of findings that he continues to unlawfully occupy the Trust lands and thus, is effectively interfering with the administration of Trust business. The situation would have been different had he diligently pursued his rights of appeal as that would have allowed the appeals to be disposed of reasonably quickly in the interests of justice and for the benefit of all parties who need certainty so as to organise their affairs. In our "Reasons for Judgment" of 22 November 2013 we commented upon Mr Nicholls' diversion to himself of income from the camping ground and his refusal to comply with court directions to provide details of that income. Again, the inference we draw from this conduct is that Mr Nicholls is trying to delay having to surrender possession of the camping ground and the income that goes with it. In our view the interests of justice favour the Trustees and the remaining beneficial owners who have for some time now, been deprived of those assets.

The Extent of the Prejudice Caused By the Delay

[39] The issue of prejudice must be weighed as against the position of the parties.

Submissions for the Applicant

[40] Mr Kahukiwa contended that there appears to be no prejudice to any party in allowing the applicant to bring his appeal. This was mainly justified on the basis that the Trust, in his submission, has not it was claimed "actually started administering these lands". The inference to be drawn relates to the continued occupancy of those lands by the applicant.

Submissions for the Respondent

[41] Mr Wackrow pointed out that the Trustees are obliged at law to administer the Trust and have attempted to do so since the Trust was constituted. In fact they have met 40 times since the Trust was created. They have been particularly focused on the litigation involving

the applicant and on the Trust's financial obligations including the rates and mortgage. The applicant's actions have, it was submitted, "fettered the ability of the Trustees" to administer the land held by the Trust.

Findings of the Court

[42] We find that the prejudice to the Trust, the land itself, the beneficial owners and everyone who has had dealings with the Trust since August 2011, if the appeal was allowed to proceed, would be significant and is wholly unjustifiable and cannot be in the interests of justice. For the reasons we have outlined above as to the delays and conduct of the applicant, the prejudice to the Trust and third parties outweighs the prejudice to the applicant by not granting leave.

The Prospective Merits of the Appeal

[43] Under this head we consider what is known regarding the merits of any appeal.

Submissions for the Applicant

[44] Key to the applicant's case on appeal, it was contended, is the extent to which the Court has the power to impose a Trust on him, and thus, a land management regime upon him, despite his protests and his position as administrator of an estates trust. A corollary to this point, Mr Kahukiwa argued, was the proposition that a trust is grounded by an intention of the parties to create it. In large part the case law has dealt with a set of facts in which the creation of the trust was agreed to. Here the Court created this Trust, but again, that was despite the opposition by the applicant. In effect this Trust was imposed on the applicant, and now, by dint of that imposition, it is said that he, and in his role as Court appointed administrator, is subject to a range of laws that stem from trusts that were created by agreement.

[45] Mr Kahukiwa submitted that the question on appeal is whether the applicant's objection, as a matter of law, was meritorious? Another related question is whether a property holder (who has capacity) and who is "engaged" in the lands that are the subject of such an application, can basically be forced to submit to a trustee?

[46] It was submitted that the applicant's prospects of succeeding on these questions of law are high in relation to the general law of trusts.

Submissions for the Respondents

[47] Mr Wackrow submitted that the notice of appeal does not identify any meritorious grounds of appeal. Furthermore, he argued Judge Milroy correctly applied the law and her discretion. There were no grounds in terms of the general law of trusts, that would prevail over the application of Te Ture Whenua Māori Act 1993 and the manner in which trusts are constituted or trustees appointed under that Act. Thus, there were no sufficient grounds to justify Mr Kahukiwa's submission that the appeal has merit.

[48] Nor does the constitution of the Trust impact on the applicant's ability to administer the estate of his father.

Findings of the Court

[49] We accept the submissions of Mr Wackrow on this point.

Whether the Appeal Raises any Issue of Public Importance

[50] As we noted above, Mr Kahukiwa referred to the Preamble, ss 2 and 17 of the Act, and he contended that in determining whether this application is granted, these principles and directives must be furthered, and not contravened or "run up against" in any exercise (or non-exercise) of the discretion that the applicant seeks to raise.

Submissions for the Applicant

[51] Mr Kahukiwa submitted; firstly, the applicant ought to be able to have his questions determined on appeal; second, the questions raised will be of interest to all Māori land owners who are either "in trusts," or who are contemplating constituting them.

Submissions for the Respondent

[52] Mr Wackrow submitted that there were no issues of public importance raised by the Appeal as this is a matter that concerns only the applicant and the Trust.

Findings of the Court

[53] We have come to exactly the same conclusion and find that there are no issues of public importance that we need to consider.

The Overall Schema of the 1993 Act

[54] Mr Kahukiwa's submissions on this matter are summarised above at [50].

[55] Mr Wackrow noted that the principles and directives of the Act apply equally to the Trust and all the owners, not just the applicant. As he is only a minority owner, the Trust was needed to protect the majority interests in the land, but the behaviour of the applicant continues to undermine that.

Findings of the Court

[56] We accept that submission and after considering and applying the Preamble, ss 2, and 17 we consider that the overall scheme of the Act favours the respondents.

Result

[57] The applicant has not been able to demonstrate sufficient cause for why leave to appeal out of time should be granted and it is not in the interests of justice to grant such leave.

[58] Pursuant to r 8.20(3) of the Māori Land Court Rules 2011 this determination has been signed by the presiding judge and is hereby endorsed with a note that it is made under this rule.

[59] The Case Manager is directed to forward a copy of this minute to all parties.

C L Fox
DEPUTY CHIEF JUDGE
(Presiding Judge)