IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIARIKI DISTRICT

A20150002453
APPEAL 2015/10

UNDER	Sections 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Te Kaha 65 Block
BETWEEN	EDWARD MATCHITT Applicant
AND	PARATENE MATCHITT Respondent

Hearings:	2015 Māori Appellate Court MB 404 – 416, 11 August 2015 (Heard at Rotorua)
Coram:	Judge L R Harvey (Presiding) Judge D J Ambler Judge S R Clark
Appearances:	Mr J P Koning for the appellant Mr A M Gallie for the respondent
Judgment:	20 August 2015

JUDGMENT OF THE MĀORI APPELLATE COURT

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Introduction

[1] In a reserved decision dated 16 September 2014, Deputy Chief Judge Fox dismissed applications for partition and the amendment of occupation orders, in respect of the Te Kaha 65 Block. Of her own motion she made an occupation order in favour of three owners of the block.[1]

[2] Edward Matchitt filed an appeal against those orders on 1 April 2015 – 6½ months after the release of Judge Fox's decision. Section 58(3) of Te Ture Whenua Māori Act 1993 ("the Act") provides that an appeal must be filed within two months after the date of the order appealed from. Thus the appeal was filed 4½ months late.

[3] Accompanying the notice of appeal was an application for leave to appeal out of time together with an affidavit in support. In this decision we are only addressing whether or not to grant leave to appeal out of time. We are not addressing the substantive appeal.

Background

[4] Te Kaha 65 is a block of Māori freehold land enjoying sea and coastal views and is located a short distance from the Te Kaha township.[2] The block comprises some 3.252 hectares[3] and there are 10 co-owners in unequal shares. The owners are closely related whānau, mostly siblings.

[5] In her judgment Judge Fox referred to a history of dispute between the owners, and a variety of applications that had been previously heard by the Māori Land Court.[4]

[6] On 11 September 2013 Paratene Matchitt filed an application for partition seeking to sever Te Kaha 65 Block into two parcels. He sought to have the southern flat part of the block separated from the northern contoured part which is the location of an historic pā site. Paratene Matchitt sought partition of the northern portion in favour of himself and two other owners.

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1 *Matchitt – Te Kaha 65* (2014) 104 Waiariki MB 145 (104 WAR151).
2 Record on Appeal, at p 195.
3 Te Kaha 65 Block – Computer Freehold Register GS4C/996.
4 *Matchitt – Te Kaha 65* (2010) 22 Waiariki MB 192 (22 WAR 192); *Matchitt – Te Kaha 65* (2012) 65 Waiariki MB 120 (65 WAR 120).

[7] On 13 December 2013 Edward Matchitt filed an application seeking to amend four occupation orders held by himself, Bert Matchitt, Peter Mariu and Roger Matchitt respectively.

[8] The applications were heard by Judge Fox on 29 January 2014.[5]

[9] On 16 September 2014 Judge Fox released her reserved decision. In relation to the partition application she recorded that although all the parties agreed to a partition they could not agree as to where a boundary line should fall. In those circumstances she found that there was insufficient support for the partition proposal. She also held that the evidence demonstrated that the partition was desirable rather than being "necessary".[6]

[10] With respect to the application to amend the occupation orders, Judge Fox found that no logical explanation had been provided by the applicants other than they had agreed to the changes amongst themselves. She was of the view that the proposed adjustments would lead to an inequity as against the balance of the owners represented by Paratene Matchitt. Judge Fox went on to indicate that she was not prepared to exercise her discretion in favour of the applicants "just because they have changed their mind and want larger areas."[7]

[11] Judge Fox indicated that she would find "a fair and practical solution" to the circumstances facing the owners. The solution she came to was granting an occupation order of the northern portion. Judge Fox had not discussed this option with the parties during the course of the hearing. Nevertheless, she did not consider that any issues of natural justice arose as the parties have "said all they have to say on the occupation of this block". She went on to say that:[8]

> Obviously if any new matters are considered important enough, the parties may apply for a rehearing.

[12] At that time Edward Matchitt was represented by a lay advocate – Walter Rika. Mr Rika had a telephone conversation with Paratene Matchitt on or about 14 October 2014 at which time, according to Edward Matchitt, there was unanimous support and agreement for a partition order.[9]

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5 91 Waiariki MB 55 (91 WAR 55).
6 *Matchitt – Te Kaha 65* (2014) 104 Waiariki MB 145 (104 WAR 145) at [16] and [17].
7 Ibid at [21], [22] and [23] inclusive.
8 Ibid at [18] and [19].
9 *Affidavit of Edward Matchitt* dated 18 March 2015, Record on Appeal at 144-147.

[13] In reliance upon that "agreement", Edward Matchitt filed an application for rehearing on 15 October 2014.

[14] On 17 November 2014 Paratene Matchitt filed a notice of intention to appear in relation to the rehearing application. The notice disputed the existence of any agreement concerning partition.

[15] On 20 November 2014 Judge Fox held a telephone conference. During the conference, counsel for Paratene Matchitt did not agree that an agreement had been arrived at and confirmed that his client opposed the application for rehearing.[10]

[16] The rehearing application was heard on 8 December 2014 and duly dismissed by Judge Fox.[11]

[17] Subsequently, the appeal and application for leave to appeal out of time together with a supporting affidavit was filed with the Māori Land Court on 1 April 2015.

[18] On 5 August 2015 Mr Koning filed submissions in support of the application for leave to appeal out of time. On 10 August 2015 Mr Gallie filed submissions in reply. On 11 August 2015 we heard oral argument on the question of leave by telephone conference.[12]

The legal principles

[19] Pursuant to s 58(3) of the Act, this Court has a discretion to grant leave to appeal out of time.[13]

[20] As the Court of Appeal said in *Robertson v Gilbert*, the overarching consideration when determining whether or not to grant an extension of time is where the interests of justice lie.[14] At paragraph [24] they observed:

> [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

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10 108 Waiariki MB 11 (108 WAR 11).
11 112 Waiariki MB 23 (112 WAR 23).
12 Rules 8.14 and 8.20 of the Māori Land Court Rules 2011 provide that a hearing of this type can take place by way of remote conference procedure.
13 *Ross – Part Rangatira E Block* (1998) 1 Waiariki Appellate MB 111 (1 AP 111).
14 *Robertson v Gilbert* [2010] NZCA 429 at [24]. For recent affirmation of that principle see *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518, *Barber v Cottle* [2010] NZCA 31 and *Reekie v Attorney-General* [2015] NZCA 198 at [11].

> 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.

[21] In *Koroniadis v Bank of New Zealand* the Court of Appeal affirmed that relevant considerations in determining whether to grant an extension of time include: [15]

(a) The length of the delay and the reasons for it;

(b) The parties' conduct;

(c) The extent of prejudice caused by the delay;

(d) The prospective merits of the appeal; and

(e) Whether the appeal raises any issue of public importance.

[22] This Court has applied those principles in recent cases involving applications for leave to appeal out of time, examples being: *Davis v Mihaere – Torere Reserves Trust*[16] and *Nicholls v Nicholls – W T Nicholls Trust.*[17]

Submissions for the appellant

[23] Mr Koning accepted that the delay in filing the appeal was lengthy, but was not, he argued, in and of itself decisive. He submitted that some of the initial delay can be explained due to a misunderstanding which occurred between Mr Rika and Paratene Matchitt on or around 14 October 2014.

[24] Up until the 17th or at the latest the 20th of November 2014, Edward Matchitt was under the assumption that an agreement had been reached with his brother Paratene Matchitt concerning partition. When Edward Matchitt learnt of the opposition to the rehearing he

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15 *Koroniadis v Bank of New Zealand* [2014] NZCA 197 at [19].
16 *Davis v Mihaere – Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641).
17 *Nicholls v Nicholls – W T Nicholls Trust* [2013] Māori Appellate Court MB 636.

was already committed to that Court process and it was submitted that it was not a foregone conclusion that Judge Fox would dismiss the application for a rehearing. Counsel also reminded us that at that stage Edward Matchitt was not legally advised.

[25] By way of explanation for the delay in filing between 8 December 2014 and 1 April 2015, Mr Koning advanced the intervening Christmas holiday period, that Edward Matchitt sought legal advice sometime in February 2015, then followed a period of drafting of the notice of appeal and interlocutory application for leave and the taking of instructions.

[26] On the question of the merits of the appeal, Mr Koning submitted that it was reasonably arguable that there was a sufficient degree of support for the partition. In addition that it was open to Judge Fox to make a determination on the location of the boundary or to adjourn the application pending further evidence and submissions from the parties.

[27] On the question of the application for amendment of the occupation orders, Mr Koning submitted that it is reasonably arguable that Judge Fox did not exercise her discretion under s 330 of the Act in a fair and reasonable manner.

[28] The major reason advanced by Edward Matchitt on the question of the merits relates to the decision by Judge Fox, having dismissed the applications before her, to then of her own motion make an occupation order for the northern portion in favour of Paratene Matchitt, Mana Matchitt and Elaine Hutchinson. Objection is taken because:

(a) There was no application before the Court;

(b) There was no need to impose that solution on the owners, particularly as it was not contemplated during the course of either application before the Court;

(c) No notice was given to the owners of Judge Fox's intention to invoke s 37(3) of the Act, thus there was a breach of the rules of natural justice;

(d) The Court should not have granted an occupation order to three co-owners;

(e) The area encompassed by the occupation order includes the family homestead. There are a number of contingent owners in that homestead, in addition to those to whom the occupation order was granted.

[29] Mr Koning also submitted that there was no prejudice to the respondent and that the appeal raises a question of public importance being the nature and limits of the Court's jurisdiction under s 37(3) of the Act. In particular, whether the Court could, as Judge Fox did in the circumstances of this case, dismiss applications before her and then proceed to make a different order under s 37(3).

[30] Mr Koning finally submitted that taking into account the above factors, the overall interests of justice favour the granting of leave to hear the appeal out of time.

Submissions for the respondent

[31] Mr Gallie pointed to the lengthy delay in filing the appeal and application for leave to appeal out of time.

[32] He contended that whilst Edward Matchitt had explained his reasons for not filing an appeal up until 17 November 2014, he had failed to provide any explanation for any subsequent delay between 17 November 2014 and 1 April 2015.

[33] Mr Gallie also submitted that the appellant was aware on 17 November 2014 or at the latest 20 November 2014, that the basis for the rehearing was disputed. Thus the rehearing application was doomed to fail. Notwithstanding that, the appellant chose to proceed with the rehearing, rather than filing an appeal.

[34] On the questions of the merits, Mr Gallie submitted that there was insufficient support for the partition as the boundary line remained in dispute, thus there was no consensus or agreement. He also submitted that the appeal by Edward Matchitt of the partition application was illogical as he had opposed the application from the outset. The dismissal of the partition application by Judge Fox meant that Edward Matchitt achieved the result he wanted.

[35] With respect to the application for variation of occupation orders, Mr Gallie submitted that Judge Fox's decision was correct, particularly when the appellant had not provided any explanation to the Court as to why the variations were sought.

[36] On the question of Judge Fox invoking s 37(3) of the Act, Mr Gallie submitted that the judgment, when read as a whole, clearly indicated that the Court retained jurisdiction to make an order pursuant to s 37(3) of the Act. On the question of notice, Mr Gallie argued that as Judge Fox had indicated in her decision, that:[18]

> [19] …issues of natural justice did not arise as the parties have said all they have to say on the occupation of this block. None of it is new to the Court and all of it is a repeat of the evidence and submissions previously heard.

[37] Mr Gallie submitted that prejudice was being occasioned to the respondent. He pointed to significant delay and that Paratene Matchitt wanted to commence a process for the establishment of a whānau trust to develop the northern portion for a pā site. Nevertheless, he conceded that his clients had not altered their position in reliance upon Judge Fox's decision.

[38] Mr Gallie argued that the appeal did not give rise to any issue of public importance.

Discussion

The delay

[39] Pursuant to s 58(3) any appeal should have been filed on or before 17 November 2014. The notice of appeal was not filed until 1 April 2015, a delay of some 4½ months. The delay was not insignificant.

The reasons for delay

[40] Edward Matchitt provided an affidavit in support of the application for leave to appeal out of time. His affidavit provides only a partial explanation for the delay. He thought he had reached an agreement for partition with Paratene Matchitt on or around 14 October 2014. On that basis he then filed an application for a rehearing. On 17 November or at the latest on 20 November 2014 Edward Matchitt was disabused of that understanding. In spite of that he continued with the application for rehearing on 8 December 2014 knowing that a substantial argument in support of the rehearing application had disappeared.

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[18] *Matchitt – Te Kaha 65* (2014) 104 Waiariki MB 145 (104 WAR 145) at [19].

[41] What concerns us most is that there was no explanation provided by Edward Matchitt for the delay between 8 December 2014 and 1 April 2015. The explanations proffered by Mr Koning may be correct but they came from the Bar. In an application for leave to appeal out of time it is incumbent upon the applicant to fully set out the grounds explaining the delay. That did not occur in this case.

The parties' conduct

[42] Judge Fox refers to a history of conflict between the owners of the block. However, there is nothing in the material in front of us that constitutes disentitling conduct by the appellant.

Prejudice

[43] The major ground of prejudice advanced by Paratene Matchitt is that any delay in the proceedings prevents his interests from forming a whānau trust to administer the northern portion of the block. In our view, Paratene Matchitt is operating under a misunderstanding of the law. There is nothing at this stage preventing him and those who wish to vest their interests into a whānau trust from proceeding with such an application.

[44] On that ground we cannot see that there is any real prejudice to the respondent if the appeal proceeds.

The merits of the appeal

[45] In her decision Judge Fox not only dismissed the applications before her but then imposed a solution – in the form of an occupation order – which the appellant, respondent and other owners had no notice of. She provided explanations at paragraphs [18], [19] and [23] of her decision as to why she did so. In essence she was striving to achieve a practical solution to the particular circumstances of the owners and this block.

[46] Judge Fox's solution was to invoke s 37(3) of the Act and grant an occupation order of her own motion in favour of three owners for the northern portion. We accept that Edward Matchitt has a reasonable argument on appeal that in taking that step Judge Fox:

(a) Breached the rules of natural justice; and/or

(b) Failed to take into account the mandatory considerations set out in s 329 of the Act.

[47] On the question of the dismissal of the partition and amendment of occupation order applications, there has been insufficient material placed before us to conclude whether those aspects of the appeal also have merit. But we cannot exclude that possibility.

[48] There is another complicating factor we have identified which supports leave being granted. There is a homestead on the northern portion of the block. A s 18(1)(a) order determining ownership of the dwelling in favour of Harata Matchitt was made on 3 July 1995.[19]

[49] We were informed from the Bar that Harata Matchitt is the mother of Edward and Paratene Matchitt. We were also informed that Edward Matchitt is the executor of his late mother's estate and that pursuant to her Will the contingent owners of that dwelling are her seven children.

[50] Judge Fox granted an occupation order in favour of three persons, Paratene Matchitt, Mana Matchitt and Elaine Hutchinson for that area of land which encompasses the homestead. An occupation order grants to its recipients the exclusive use and occupation of the land encompassed in the order. Thus, the situation becomes complicated as a result of the occupation order. On the one hand, there are three people who now have the exclusive right to occupy the northern section, including the land upon which the homestead is built. On the other hand, there are some contingent owners in the homestead who may have no right of access to the homestead given the presence of the occupation order.

[51] In her reserved decision Judge Fox said that she would "make an occupation order under s 328 (less current access arrangements) for the area described in the Partition Application as the Northern section…" It is unclear to us what she meant by "current access arrangements". A sealed order is on the partition file.20 That too refers to "current access arrangements" but does not shed any light as to what that means. There is nothing on the Memorial Schedule for Te Kaha 65 Block recording any formal access arrangement to the block.

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19 70 Opotiki MB 99 (70 OPO 99).

20 A20130008237, 104 Waiariki MB 145 (104 WAR 145), although we note that it is not yet recorded on the Memorial Schedule for the block.

[52] We consider that Edward Matchitt has a reasonable argument on appeal that the occupation order made by Judge Fox may have inadvertently affected existing or contingent legal rights in respect of the homestead.

Interests of justice

[53] The length of the delay and the failure by Edward Matchitt to provide any explanation for the delay between 8 December 2014 and 1 April 2015 might ordinarily have been fatal to the application for leave to appeal out of time. However, what tips the balance in favour of Edward Matchitt is our conclusion that there is some merit in the grounds of appeal.

[54] We also take into account that partition or occupation order applications are different in nature to civil proceedings in the District or High Courts. They are not "litigation" in the truest sense, where the court provides a final ruling on a controversy between the parties. Applications for partition or occupation orders involve the lower Court exercising a statutorily prescribed discretion to invoke legal tools to address the circumstances of multiply-owned land. Like applications for review of trusts, they are not subject to the doctrine of *res judicata*: further applications can be brought in relation to the same subject matter.[21] Importantly, as is demonstrated in the present case, the proceedings involve whānau members, most of whom are siblings, who will continue to live alongside each other for years to come. While there is undoubted value in ensuring the certainty of outcome of proceedings in the lower Court, this Court is also minded to ensure that the outcome of these types of proceedings is durable and does not lead to further disruptive proceedings.

[55] In the circumstances of this case we consider it is appropriate to grant leave to appeal out of time so that the decision and orders of Judge Fox can be examined in the hope that enduring solutions are reached for all owners.

Decision

[56] Leave to appeal out of time is granted.

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[21] *The Trustees of the Pukeroa Oruawhata Trust v Mitchell* [2008] NZCA 518.

[57] This appeal will be heard in the November 2015 appeals week at the Māori Land Court at Rotorua, Hauora House, Haupapa Street, Rotorua – the date and time of the appeal will be confirmed in due course.

Timetable for the filing of submissions

[58] The appellant is to file and serve submissions in advance of the appeal together with any bundle of authorities by **4.00pm, Tuesday 27 October 2015**.

[59] The respondent is to file and serve submissions in advance of the appeal together with any bundle of authorities by **4.00pm, Tuesday 3 November 2015**.

This judgment is endorsed pursuant to rule 8.20(3) of the Māori Land Court Rules 2011.

L R Harvey (Presiding) **JUDGE**	D J Ambler **JUDGE**	S R Clark **JUDGE**