IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20170001430

UNDER	Section 79 Te Ture Whenua Māori Act 1993
IN THE MATTER OF	WANI WANI 1 BLOCK
BETWEEN	WIREMU HIRA RICK MURU AS TRUSTEE OF WANI WANI 1 TRUST Applicant
AND	MAUNGATAUTARI ECOLOGICAL ISLAND TRUST Respondent

Hearing: 9 August 2017
(Heard at Hamilton)

Court: Judge M P Armstrong (presiding)
Judge L R Harvey
Judge M J Doogan

Appearances: P Jefferies for the Appellant
S Garmonsway for the Respondent

Judgment: 21 August 2017

JUDGMENT OF THE COURT

Copies to:

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Introduction

[1] Wiremu Muru as trustee of the Wani Wani 1 Trust applied for an injunction against the Maungatautari Ecological Trust. The proceedings were eventually discontinued in 2016. Judge Savage determined costs against Mr Muru.[1] He appealed that decision.

[2] We heard the appeal on 9 August 2017, where we granted leave to appeal out of time, and then dismissed the appeal. We now set out our reasons for those decisions.

Leave to appeal out of time

[3] Mr Muru applied for leave per r 8.14 of the Māori Land Court Rules 2011. The notice of appeal was due on or before 23 January 2017. It was e-mailed to the Court on 27 January and filed on 1 February 2017. Mr Jefferies, counsel for the appellant, submits that the appeal was filed out of time because:

(a) counsel had only received final instructions shortly before that date; and

(b) the intervening statutory and Christmas holidays contributed to less time being available to file the notice of appeal.

[4] In *Koroniadis v Bank of New Zealand* the Court of Appeal confirmed that the relevant considerations in determining whether to extend time include:[2]

(a) The prospective merits of the appeal;

(b) The parties' conduct;

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

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

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

[5] The core question is whether the interests of justice warrant the granting of leave.[3]

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1 131 Waikato Maniapoto MB 77 (131 MB 77).

2 [2014] NZCA 197. Those principles have been applied by this Court, see *Tahere v Tau* (2017) Māori Appellate Court MB 62 (2017 APPEAL 62) at [16].

[6] The respondent submits that the reasons for the delay were not so extraordinary as to warrant leave and it made genuine attempts to settle the proceedings. Equally importantly, counsel contended that the respondent will suffer prejudice if the appeal were to proceed, and underscored that the appeal does not raise any public interest considerations.

[7] These proceedings were discontinued in 2016. The sole remaining issue is costs. There is no prejudice to the respondent if leave is granted. We are satisfied that there is a reasonable explanation for filing the appeal one week out of time. The interests of justice warrant leave to appeal out of time, and leave was granted accordingly.

Māori Land Court judgment

[8] The respondent incurred costs of $49,985.73. It sought an award of costs of 70 percent of that figure plus disbursements of $497.69 (a total of $35,487.70.).

[9] The Court below was satisified that the respondent's costs were reasonably incurred. The learned Judge placed weight on the appellant's unwillingness to compromise. He noted that the appellant had rejected serveral without prejudice offers. Some of these offers were made early in the proeedings and if accepted would have had costs lying where they fell. The Judge also observed that the application was pursued vigorously, especially in the early stages, and that the ultimate outcome would arguably have been achieved sooner had the appellant's representative taken a less combative stance.

[10] Judge Savage noted that the parties had an ongoing relationship under a Heads of Agreement and lease. Costs were fixed at 60 percent of actual costs incurred plus disbursements (a total of $30,489.13).

The Law

[11] Awarding costs is an exercise of discretion.[4] Such decisions can only be overturned where the Court below erred in law or principle, took account of irrelevant considerations, failed to take into account a relevant consideration, or came to a plainly wrong conclusion.[5]

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3 *Tahere v Tau*, above n 2, at [16], *Davis v Mihaere - Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641) at [43] and *Nicholls v Nicholls - Part Papaaroha 6B Block* [2013] Māori Appellate Court MB 636 (2013 APPEAL 636) at [19]

4 See *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184); *Samuels v Matauri X* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216); *Nicholls v Nicholls - Part Papaaroha 6B* (2011) Māori Appellate Court MB 64 (2011 APPEAL 64)

5 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32]

Appellant's submissions

[12] Mr Jefferies submits that costs should lie where they fall. He argued:

(a) the appellant acted reasonably throughout the proceedings and was justified in raising the issues he did in both stages of the proceedings;

(b) the HOA and lease effectively settled the stage one dispute;

(c) references to 'protracted proceedings' were inapposite as there was a lengthy adjournment from September 2013 to early January 2016;

(d) the offer of the respondent to withdraw the proceedings in August 2013 with costs lying whether they fall was appropriate and, notwithstanding the fact the appellant did not accept that offer, it remained appropriate for stage one costs to lie where they fall.

Discussion

[13] The Court retains discretion on costs and costs generally follow the event. This includes when a notice of discontinuance has been filed, unless the parties have agreed otherwise.[6] Judge Savage concluded that there was no basis on which to depart from that principle in this case. We see no error in that approach.

[14] The Judge was entitled to take the conduct of the parties into account.[7] Mr Muru's failure to accept several offers of settlement, some of which were made early in the course of the proceedings, was a notable feature of the case, and one which was correctly accorded weight when setting costs.

[15] In argument before us Mr Jefferies did not take issue with the costs of the second stage of the proceedings being awarded to the respondent. His focus was on those incurred during the first stage. He argued that the proceedings were not 'protracted' because the first stage ended in the middle of 2013 with the execution of the lease.

[16] Even so, this argument fails to address the fact that his client chose not to accept offers to settle at that time. This failure to withdraw, with costs to lie where they fell, in 2013 was followed

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6 *Earthquake Commission v Whiting* [2015] NZCA 144 at [62]-[72]
7 *Samuels v Matauri X*, above n 4, at [13].

by rejection of a second similar offer in 2016. In taking that approach, Mr Muru accepted the risk that costs may follow the event.

[17] Judge Savage recognised that the appellant and respondent have an ongoing relationship, and considered that, in setting costs at 60% of actual costs. We see no failure to take into account relevant considerations, and neither do we think the Judge took account of irrelevant considerations.

[18] We agree that a 60% contribution to costs is reasonable in the circumstances of this case and detect no error on the part of the Judge.

Decision

[19] On 9 August 2017, we granted an orders under Te Ture Whenua Māori Act 1993 per:

(a) section 58(3) granting the appellant leave to appeal out of time.

(b) section 56(1)(g) dismissing the appeal.

[20] If costs are sought on the appeal we have directed counsel for the respondent to file and serve submissions by 23 August 2017 with counsel for the appellant to respond by 6 September 2017.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

M P Armstrong **JUDGE** (Presiding)	L R Harvey **JUDGE**	M J Doogan **JUDGE**