IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TE TAITOKERAU DISTRICT

A20180008889
A2018/20

UNDER	Section 45, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Ngaiotonga A3
BETWEEN	RIKI NGAKOTI HAYWARD BROWN Appellants
AND	DEPARTMENT OF CONSERVATION Respondent

Court: Chief Judge W W Isaac (Presiding)
Judge P J Savage
Judge D H Stone

Appearances: B Arapere for the Respondent
R Ngakoti and H Brown in person

Judgment: 1 May 2019

JUDGMENT OF THE MĀORI APPELLATE COURT

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[1] This is an appeal by Riki Ngakoti and Hayward Brown against a decision to dismiss an injunction at 181 Taitokerau MB 165-184 dated 24 September 2018.

[2] The notice of appeal was lodged with the Māori Appellate Court on 5 December 2018, 11 days outside of the time specified at s 58(3) Te Ture Whenua Māori Act 1993 (the Act).

[3] The notice of appeal was accompanied by an application for leave to file the notice of appeal outside the time provided in s 58 of the Act.

[4] A telephone conference of all parties was called on 18 April 2019 to consider a number of issues arising from the notice of appeal and the application for leave to file late.

[5] The issues discussed included:

(a) The late filing of the appeal;

(b) Had the 1080 drop taken place and the land affected;

(c) The ground of appeal relied on by the appellants.

The Framework

[6] Section 58 of the Act permits the Court to allow appeals out of time and r 8.14 of the Māori Land Court Rules 2011 (the Rules) sets out the procedure by which that discretion is to be exercised. The Rules, however, do not set out in detail how that discretion is to be exercised.

[7] Rule 8.14 is similar (although not identical) 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:[1]

[1] *Almond v Read* [2017] NZSC 80, [2017] NZLR 801.

(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.[2]

(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.[3]

(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.[4]

(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 a 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".[5]

[8] We apply these principles to the application for leave to appeal out of time under r 8.14.

[2] Above n 2 at [36].
[3] Above n 2 at [37].
[4] Above n 2 at [38].
[5] Above n 2 at [39].

Has there been a minor slip-up?

[9] Mr Ngakoti explained that the notice of appeal was prepared prior to the receipt of the minutes but not lodged with the Court as the appellants wished to receive the minutes and check the notice of appeal against the minutes.

[10] Mr Ngakoti confirmed he had communicated to the then Chief Registrar and she had supported the action taken by the appellants in relation to waiting for the minutes prior to filing the appeal.

[11] Ms Arapere for the Department of Conservation (DOC), stated that the appellants were present at Court and heard the Court's decision first hand and they were not prejudiced by not receiving the minutes prior to filing the notice of appeal.

[12] Having heard Mr Ngakoti's explanation, we acknowledge the steps taken by him were reasonable and based upon discussions with the Chief Registrar. Mr Ngakoti, was entitled to wait for the receipt of the minutes prior to filing the notice of appeal if that course of action was supported by the Chief Registrar.

[13] Although the delay in filing the appeal could be categorised as a minor slip-up, the ultimate question is what the interests of justice require. We now turn to those considerations.

What do the interests of justice require?

[14] The length of delay was not significant and, as noted, the reason for it was understandable. Nor is the delay itself prejudicial to the respondent. These factors generally point to granting the extension. On the other hand, the issue on appeal is not particularly significant, which supports a decision to refuse the extension. All said, these factors are relevant, but not determinative.

[15] The merits of the appeal, however, tell a different story. There are questions as to whether there is any useful purpose served by the granting of injunctive relief on appeal and whether there are proper grounds for the appeal.

Is there any useful purpose for the appeal?

[16] Ms Arapere confirmed that the 1080 drop took place a few days after the lower Court hearing on 24 September 2018 on Crown land and Māori Freehold land known as Rawhiti 6 for which DOC had received consent from the trustees of that land.

[17] Ms Arapere submitted that as the 1080 drop had taken place, no useful purpose would be served by injunctive relief.

[18] Ms Arapere also confirmed that the 1080 drop had not taken place on Ngaiotonga A3, the subject of the original application.

[19] In answer to the question as to what useful purpose would be served by continuing with the appeal after the 1080 drop had taken place, Mr Ngakoti replied that the appellants wished to determine the actual status of the Crown land subject to the 1080 drop so as to prevent 1080 being applied to any Māori land presumed to be Crown land. The appellants want DOC to set out a clear pathway for the future, such as seeking proper consultation and obtaining consent.

[20] The original application before the lower Court was for injunctive effect to prevent the 1080 drop on Ngaiotonga A3. The Court was advised that the 1080 drop was on Crown land and not Ngaiotonga A3 and dismissed the injunction for want of jurisdiction in respect of Crown land.

[21] The 1080 drop has now happened, and it did not take place on Ngaiotonga A3. Therefore, the need for an injunction is no longer required in respect to the present application.

[22] Also, the appellants cannot piggy back on one specific application relating to Ngaiotonga A3 to capture other land, whether Māori freehold land or Crown land, in their rohe. The application was specific to Ngaiotonga A3. This land has not been affected.

[23] Moreover, the appellants cannot use this appeal to effectively seek status orders over Crown land. Such an application should properly be first made in the Māori Land Court pursuant to s 18(1)(h) of the Act, rather than through this appeal.

[24] On the basis that no useful purpose would be served by injunctive relief in this case, and that the appeal cannot consider the status of Crown land, this aspect of the appeal could not possibly succeed.

Grounds of appeal

[25] The grounds of appeal relied on in the notice of appeal are that Judge Armstrong made an error in his determination in finding 1080 was not recognised as a whanaunga or a preferred class of alienees (PCA) found in the provisions of s 18(1)(a) of the Act.

[26] Mr Ngakoti explained that he interpreted Judge Armstrong's decision as favouring 1080 poison over the PCA, the owners or tikanga Māori.

[27] Ms Arapere submitted that the decision of Judge Armstrong made no such determination as submitted by the appellants. Further, the notice of appeal was difficult to understand and lacked sufficient particulars.

[28] We agree with Ms Arapere. The decision of Judge Armstrong did not determine that 1080 was not recognised as a whanaunga or PCA in terms of the Act. Nor did it prioritise 1080 over the PCA, the owners or tikanga Māori.

[29] The Court found that it did not have jurisdiction to grant an injunction over public conservation lands, nothing further. The appellants are not entitled to plead an issue on appeal which formed no basis of the lower Court's decision. For this reason, this fundamental aspect of the appeal would clearly fail.

Decision

[30] We are mindful that there is a right to a first appeal and r 8.14 should not be used as a mechanism to dismiss an apparently weak appeal summarily. We are also mindful that it will be relatively rare to be able to conclude summarily that an appeal must necessarily fail, so that an appeal can effectively be struck out. However, this is one of those rare circumstances. The appeal is clearly hopeless. The lack of merit is readily apparent.

[31] Accordingly, the application for leave to file the appeal out of time is refused. The appeal is therefore dismissed.

[32] There will be no order as to costs.

Pronounced at 3.00pm in Wellington on Wednesday this 1st day of May 2019.

W W Isaac	P J Savage	D H Stone
CHIEF JUDGE	**JUDGE**	**JUDGE**