IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAITOKERAU DISTRICT

A20170001285
Appeal 2017/3

UNDER	Section 58 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	An appeal by Toko Tahere, Fletcher Tahere and Canadian Tahere pursuant to s 58 of Te Ture Whenua Māori Act 1993 against an order of the Māori Land Court made on 20 September 2016 at 137 Taitokerau MB 68-105 in respect of RANGIHAMAMA X3A AND OMAPERE TARAIRE E (AGGREGATED)
BETWEEN	TOKO TAHERE, FLETCHER TAHERE AND CANADIAN TAHERE Appellants
AND	SONY TAU, BRUCE CUTFORTH, TAOKO WIHONGI, TE TUHI ROBUST AND COLLEEN BROWN AS TRUSTEES OF RANGIHAMAMA X3A AND OMAPERE TARAIRE E (AGGREGATED) Respondents

Hearing:	On the papers
Court:	Judge L R Harvey (Presiding) Judge Te A Milroy Judge C T Coxhead
Appearances:	T Tahere, F Tahere and C Tahere (Appellants) PW Jones for the Respondents
Judgment:	11 April 2017

JUDGMENT OF THE COURT

Copies to: P W Jones, Lawyer 30 Hope Avenue, Russell 0202

Introduction

[1] On 20 September 2016 Judge Armstrong issued an injunction against the Tahere whānau, their agents, invitees, family members and guests, requiring them to both vacate Rangihamama X3A and Omapere Taraire E (Aggregated) and to remove all their possessions within 90 days of the judgment.[1]

[2] The Tahere whānau now appeal against that order. They do so out of time.

[3] The trustees of the land oppose both the appeal and the application seeking leave to appeal out of time. They submit that first, the reasons for the delay in filing the notice of appeal are insufficient and second, that the appellants have not set out any reasonable grounds for appeal.

[4] On 22 February 2017 Chief Judge Isaac directed the appellants to pay $1,000 as security for costs, which was paid on 14 March 2017.[2]

Issue

[5] The issue for determination is whether leave to appeal out of time should be granted.

[6] In addition, any assessment of leave invariably involves consideration of a range of factors including the merits of the appeal, the conduct of the parties, the reasons for delay, the interests of justice and whether the appeal gives rise to any question of public interest. These matters are also considered in this judgment.

Background

[7] Judge Armstrong concluded that the Tahere whānau had been occupying the land for 30 years without payment of rent and at best would only have received a bare licence which, if it existed, had since been revoked by the trustees. The Judge found that the Tahere whānau were occupying without any legal right to do so and that the trustees were accordingly entitled to an injunction.

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1 *Tau v Tahere – Rangihamama X and Omapere Taraire E (Aggregated)* (2016) 137 Taitokerau MB 68 (137 TTK 68)

2 2017 Chief Judge's MB 1-10 (2017 CJ 1-10)

[8] During the proceedings Kenneth Brown, a lay advocate for the Tahere whānau, argued that Judge Armstrong should recuse himself as he had previously issued a judgment dismissing an application to stay proceedings. Even so, Judge Armstrong considered that he could bring an impartial mind to the resolution of the substantive proceedings and proceeded to issue a decision.

Procedural history

[9] The appellants filed a notice of appeal at Whangarei on 6 December 2016 which was then sent to the Wellington registry of this Court on 8 December 2016. Following that on 12 December 2016 the Deputy Registrar wrote to the appellants advising that the application had been lodged contrary to the time for appeal as set out in r 8.8 of the Māori Land Court Rules 2011 and consequently would not be accepted.

[10] The appellants filed a further notice of appeal and an application for leave to appeal out of time dated 17 January 2017 which was received by the Wellington registry on 24 January 2017.

[11] On 22 February 2017 Chief Judge Isaac constituted the coram and set the appeal down for hearing in Whangarei on 11 May 2017.

[12] The case manager has confirmed that on 2 March 2017 an email was received from the District Court confirming that the bailiff of that Court in Kaikohe had the possession order to execute, in the absence of any application for a stay. No such application has been filed.

The Law

[13] Section 58 of Te Ture Whenua Māori Act 1993 provides:

> **58 Appeals from Māori Land Court**
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> (1) Except as expressly provided to the contrary in this Act or any other enactment, the Māori Appellate Court shall have jurisdiction to hear and determine appeals from any final order of the Māori Land Court, whether made under this Act or otherwise.
>
> (2) Any such appeal may be brought by or on behalf of any part to the proceedings in which the order is made, or any other person bound by the order or materially affected by it.
>
> (3) Every such appeal shall be commenced by notice of appeal given in the form and manner prescribed by the rules of the court within 2 months after the date of the minute of the order appealed from or within such further period as the Māori Appellate Court may allow.

[14] In addition r 8.14 of Māori Land Court Rules 2011 states:

> **8.14 Leave to appeal out of time**

(1) An appellant who seeks leave to appeal out of time under section 58(3) of the Act must-

(a) file an application that complies with rule 8.14(2) in the office of the Chief Registrar; and

(b) file a notice of appeal in accordance with rule 8.8.

(2) The application must-

(a) be in form 1 and seek an extension of time for filing a notice of appeal; and

(b) set out the reasons for the delay in filing a notice of appeal; and

(c) set out the grounds on which the extension is sought.

(3) The Chief Registrar must refer the application to the Chief Judge, who must constitute the Māori Appellate Court to deal with the application.

(4) The Māori Appellate Court may hear the application in a formal hearing, in which case the application must be set down for a fixture and notified, or it may deal with the application in accordance with the procedure set out in rule 8.20.

(5) If the application is heard in a formal hearing, the appeal may be set down to heard in the same hearing.

[15] In *Koroniadis v Bank of New Zealand* the Court of Appeal affirmed the relevant considerations in determining whether to grant an extension of time include:[3]

(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.

[16] This Court has applied those principles in a number of decisions on leave to appeal out of time.[4] The core question is whether the interests of justice warrant the granting of leave.[5]

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3 *Koroniadis v Bank of New Zealand* [2014] NZCA 197 at [19]

4 *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) and *Davis v Mihaere - Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641)

5 *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]

Appellants' submissions

[17] The appellants submit that due to financial constraints, they did not have legal representation and had not received legal advice in respect to Judge Armstrong's decision. The appellants also say that they were unaware of the time constraints for filing an appeal.

[18] The appellants submit that they have prioritised the welfare of their whānau over the filing of an appeal. They say that their kaumātua was admitted to hospital due to the stress of the proceedings and the decision. They say that they have had to cater to tangihanga and multiple hui over the last two months.

[19] The appellants argue that given the short period of delay and in light of the reasons stated they will be grossly prejudiced if leave to appeal out of time is refused.

[20] As to the question of the merits of the appeal, the notice of appeal states:

> 1. We disagree with Judges footnote 6 stating the counsel was engaged to act and his instructions were terminated. This was not the case. The only counsel who was appointed was Tony Shepherd, he was declared bankrupt then went off the grid. Mr Shepherd did not inform us nor has he made any further contact to date.
> 2. Due to the above our whānau did not have legal counsel therefore were not fully informed of the process and legalities.
> 3. As per the Preamble of Te Tur[e] Whenua Act we believe that His [Honour] Judge MP failed maintain Section 2 of Te Tur[e] Whenua Act
> 4. Pls refer to the attached case example
> 5. Despite His [Honour] claiming that no bias occurred, we believe that to be untrue and we remain of the view that His [Honour] had pre knowledge therefore a pre determined outcome
> 6. We believe that our land was placed into the Rangihamama X and Omapere Taraire E (Aggregated) without out tupuna consent. Our tupuna matua have also said our whenua should not be a part of this blocked and we as a whānau have not and cannot find/locate or recall any type or consent given for the amalgamation.
> 7. Given the treatment of our whānau during this process we as a whānau feel it unfair to force such a decision without our complete understanding
> 8. Rangihamama X3A and Omapere Taraire E (Aggregated) have never contacted, offer or given our whānau any indication of land improvement or beneficiary gains
> 9. We as a whānau feel that this decision is not support of our whānau due to the strained, untrusted relationship between ourselves and ORT

Respondents' submissions

[21] Mr Jones submits that there is no reason to grant the appellants any extension. He argues that personal circumstances, unless of an extraordinary nature, do not constitute reasonable grounds. Counsel submits that the appellants' circumstances are nothing more than "vicissitudes of ordinary life" and are not extraordinary.

[22] Counsel argues that the appellants must have been aware of the two month time limit for filing an appeal given that in the Court below they invoked numerous provisions of Te Ture Whenua Māori Act 1993 which required an extensive review of the statute. Counsel submits that, as a matter of law the appellants are deemed to be aware of this provision.

[23] Further, Mr Jones submits that the appellants have used their time not in preparing an appeal but in arranging the documents appended to the notice of appeal.

[24] As to the merits of the appeal, Mr Jones submitted that the trustees offered to contribute towards the costs of the appellants at the outset of the proceedings in the Court below. Moreover, he contends that the appellants were aware of the Special Aid fund.

[25] Counsel confirmed that the appellants initially instructed Tony Shepherd then subsequently chose to engage Mr Brown as a lay advocate who was allowed to represent them as an agent per s 70(1)(c) of the Act. The appellants filed extensive applications and submissions through Mr Brown including applications for stay, removal of trustees and recusal. Their case was argued fully before Judge Armstrong who was aware that they were not legally represented.

[26] Mr Jones also submits that the claim that s 2 was not maintained is not a ground for appeal. Judge Armstrong conformed to s 2 of the Act, in applying settled case law as to the rights and obligations for the trustees under the Act. In addition, counsel argued that declining to make an interlocutory order for a stay is not grounds for appeal. Judge Armstrong applied settled law as to judicial bias. Declining to make an order is not evidence of bias.

[27] Counsel submits further that the appellants have produced no evidence that the land was vested in the trustees without the consent of the owners at the time and the inability of the appellants to find evidence of consent for the amalgamation is not ground for appeal.

[28] Mr Jones then argued that the appellants fully understood the process of the trustees seeking to remove them from unlawful occupation of the land. If they had not understood the process they would not have made the application for stay of proceedings.

[29] Counsel submits that it is not an arguable ground of appeal to state that the decision does not support the Tahere whānau. The Tahere whānau were acting unlawfully. Any decision would not be in support of them.

[30] Regarding the annotated notes of the minutes regarding Te Tii Waitangi B3 Trust that were filed with the appeal, counsel submits that it is impossible to see how those submissions would assist this Court in the present appeal because the issues and the law are different. In addition, the appellants have made no reference to the appeal judgment in those appeals. The appellants have provided no explanation or reasoning for their appeal against the judgment of the Court below.

Discussion

What are the prospective merits of the appeal?

[31] In *Faloon v Commisioner of Inland Revenue Department* concerning an application to extend the time to appeal, the Court of Appeal confirmed that while the absence of good reason to extend time is on its own dispositive of the application, it was also necessary to address the merits of the proposed appeal as they considered them to be equally fatal to the application.[6] The Court determined that Mr Faloon's arguments made no sense legally, were untenable and the appeal he sought to pursue was "hopeless". The Court concluded that Mr Faloon had delayed in the prosecution of the appeal and sought to be allowed further delay without offering any good reason for that request.

[32] In earlier, related proceedings Elias CJ dealt with an application to strike out the case on the basis that the statement of claims disclosed no reasonable cause of action, was unnecessarily prolix, was likely to cause prejudice and embarrassment, was an abuse of process of the Court and was frivolous or vexatious.[7] In that case Elias CJ found the statement of claim to be discursive and difficult to understand. Further, the Chief Justice found it difficult to discern the relevance of much of the material filed by the plaintiff with the result that the proceedings were ultimately struck out.

[33] Turning to the grounds of appeal in the present case, we note that the respondents filed, in support, an affidavit of Tony Shepherd. In his affidavit Mr Shepherd states that he did not "go off the grid". Instead the appellants terminated his instructions to act and requested that their file be uplifted from his Chambers. Mr Shepherd says that his last meeting with the Tahere whānau was on 24 December 2013. We accept the statement of Mr Shepherd that his instructions were terminated by the appellants before he was adjudicated bankrupt. The appellants were given the opportunity to obtain legal advice which was taken. They then chose instead to appoint Mr Brown as lay advocate to represent them.

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6 *Faloon v Commissioner of Inland Revenue Department* [2016] NZCA 537

7 *Faloon v Commissioner of Inland Revenue Department* High Court Auckland M757-SD-01, 4 March 2002

[34] In addition we note that the appellants were not completely truthful about not having legal representation in the Court below, which undermines their bona fides before this court.

[35] We do not accept that the appellants were not fully informed of the process and the legal implications of their position. It was open to the appellants to seek out such advice upon receipt of Judge Armstrong's judgment.

[36] Regarding the claim that Judge Armstrong failed to "maintain s 2 of the Act" we find this ground to be incoherent. There is no further explanation of what is meant by this statement and in the absence of further explanation we do not consider it appropriate that we should attempt to infer what the appellants may or may not have meant.

[37] The appellants also claim that Judge Armstrong had pre-determined the substantive claims as he had declined the application for stay filed prior to his decision being issued. The claim of bias was squarely before the Court below where it was disposed of according to law. The appellants have not expanded on what aspects of the decision constitute bias. There is no bias simply on the basis that a decision has gone against one of the parties.

[38] The appellants maintain that their land was placed into the Rangihamama X and Omapere Taraire E (Aggregated) without the consent of their tupuna. The order aggregating the Rangihamama X and Omapere Taraire E blocks was made on 6 May 1987 and has not been challenged, despite the passage of 30 years.[8] If the appellants wish to challenge that determination then they will need to file an application per s 45 of the Act seeking to amend that order.

[39] We consider that the appellants have been aware of the proceedings throughout and understood the nature of these proceedings which concerned their occupation of the land. We agree that it is not an arguable ground of appeal to state that the decision does not support the Tahere whānau. The appellants must point to what aspect of the decision they disagree with and the grounds.

[40] We also agree with Mr Jones' submission regarding the minutes annexed to the notice of appeal. In the absence of further explanation we do not see how they relate to the present proceedings.

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[8] 15 Kaikohe MB 337 (15 KH 337)

[41] In all we are not satisfied that the merits of the appeal are sufficient to warrant granting leave to appeal out of time.

What is the relevance of the parties' conduct?

[42] In *Nicholls v Nicholls* concerning leave to appeal out of time a decision requiring the appellant to vacate the land, the Court considered that the appellant's conduct was such that he was using litigation as a means of delaying the enforcement of findings against him of unlawful occupation and of interfering with the administration of trust business.[9] The Court considered that the situation would have been different if the appellant had pursued his rights to appeal diligently, as this would have allowed the appeal to be disposed of reasonably quickly in the interests of justice and for the benefit of all the parties. The Court concluded that the interests of justice favoured the trustees and the remaining beneficial owners.

[43] In the present case regard must be had to the fact that the Tahere whānau have been in occupation of the land for 30 years. During that time there have been concerted efforts by the trustees to reach an agreement with them regarding occupation. However, despite those efforts, it became evident that no agreement could be reached and the trustees were required to seek the assistance of the Court. Judge Armstrong noted in his judgment that the intrusion on the land was not minimal and took into account the fact that the trustees were seeking to use the land as part of their farming operation which would provide a benefit for all the owners not just the Tahere whānau.[10]

[44] We consider that the conduct of the parties is relevant to the question of whether to grant leave to appeal out of time. This case and the issues that it gives rise to has taken place over three decades. The parties have been well aware of the issues. They have both been represented by counsel. They have attempted to resolve the issues between themselves but were ultimately unsuccessful. The trustees then sought the assistance of the Court, which they were perfectly entitled to do. The appellants resisted the trustees' claims and argued against their removal from the land, a position that they too were entitled to take and entirely understandable in the circumstances. In the end the Judge found against them and issued the injunction. But to suggest that somehow the appellants were not aware of the consequences of the decision and its impact on them is not an argument that can be sustained.

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9 *Nicholls v Nicholls - Part Papaaroha 6B Block* [2013] Māori Appellate Court MB 636 (2013 APPEAL 636)

10 *Tau v Tahere – Rangihamama X and Omapere Taraire E (Aggregated)* (2016) 137 Taitokerau MB 68 (137 TTK 68) at [158]-[159]

[45] The appellants' lack of good faith, in representing to this Court that they did not have legal representation in the lower court must also be taken into account in terms of their conduct. Appellants cannot ask the Court to excuse their delay and, at the same time misrepresent the facts to the Court. As such we consider it necessary to apply the rules strictly.

What is the extent of the prejudice caused by the delay?

[46] The appellants say they will be prejudiced if the appeal is not granted. They have not expanded on this statement. We take this to mean that, given the nature of the decision- being an injunction and recovery of land effectively requiring the appellants to vacate the land- that the prejudice suffered will be the requirement to vacate the block after 30 years of occupation.

[47] Conversely, the respondents will be prejudiced by not being able to enforce the injunction order for the recovery of the land and their plans to use the land as part of the farming operations will be delayed. The beneficial owners will also be prejudiced by not having the benefit of the land which they have been deprived of for 30 years.

[48] We find that the prejudice to the respondents and the beneficial owners as a whole outweighs the prejudice to the appellants.

Are the reasons for delay sufficient to warrant leave to appeal out of time?

[49] It is well settled that the onus is on an appellant to fully set out the grounds explaining the delay.[11] In the present case, the reasons argued are that the Tahere whānau did not have legal representation, were unaware of the time constraints for filing an appeal and prioritised the welfare of their whānau and related activities before turning their minds to filing an appeal.

[50] The delay is not insignificant bearing in mind our view that the appeal lacks merit, the appellants' conduct and the extent of the prejudice to the respondents. Judge Armstrong's order required the Tahere whānau to vacate the land within 90 days. Given the seriousness of the decision it was incumbent upon the appellants to seek legal advice to consider their options.

[51] In *Nicholls v Nicholls* where the notice of appeal against two judgments had been filed more than 22 months and 8 months out of time respectively this Court found that none of the reasons raised adequately explained or justified the delays in filing an appeal. [12] The appellants in

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11 *Matchitt v Matchitt – Te Kaha 65* [2015] Māori Appellate Court MB 433 (2015 APPEAL 433) at [41]

12 *Nicholls v Nicholls - Part Papaaroha 6B Block* [2013] Māori Appellate Court MB 636 (2013 APPEAL 636)

that case had been present when the orders were made and had no reasonable excuse for not taking action. Moreover, it was not in the interests of justice to continue to subject the respondent to what they deemed essentially delaying tactics by the appellant.

[52] Similarly, in *Davis v Mihaere* the appellants filed a notice of appeal three months outside of the two month period.[13] This Court considered that the delay in that case was not insignificant given that the application before the Court concerned the administration of the trust and the appellants wanted the appointment of trustees dealt with expeditiously. The Court found that the appellants had not sufficiently explained the delay. They had actively been involved in the process and did not have the excuse of belatedly learning of the outcome.

[53] The Court was sympathetic to the fact that the appellants had suffered a bereavement during this period but that event did not explain why the others involved in the appeal could not have taken steps to file the appeal on time. The Court did not accept the claim that the appellants were unable to contact their counsel to make arrangements to file the appeal due to poor cell phone coverage in their area.

[54] We agree with Mr Jones that the appellants' reasons are not sufficient to explain the delay. It was open to any of the appellants to file the notice of appeal during the two month period notwithstanding the prioritisation of the welfare of the whānau. It seems to us that filing an appeal in time against an order requiring that the whānau vacate the land they had occupied for 30 years should have had a high priority in terms of whānau welfare. In addition we do not accept that the appellants were unaware of the time constraints. The appellants have been present throughout the proceedings, and it was always open to them to seek clarification from the registry in Whangarei if the appellants did not agree or understand Judge Armstrong's decision.

[55] We consider that the lack of legal representation due to financial constraints is not a sufficient explanation for the delay. In the Court below the appellants were initially represented by counsel and by their choice opted to withdraw counsel's instructions to act and instead be represented by Mr Brown, a lay advocate. They could have also sought assistance from the Special Aid fund for the appeal to pay for counsel's costs. In summary, we are not satisfied that the reasons for the delay are adequate to grant leave to appeal out of time.

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13 *Davis v Mihaere - Torere Reserves Trust* [2012] Māori Appellate Court MB 641 (2012 APPEAL 641)

What are the interests of justice in this case?

[56] Having regard to the findings above and, in particular, the prejudice to the trustees and the beneficial owners, we consider that the appellants have failed to prosecute the appeal in a timely manner and have not provided a reasonable explanation for the delay. Moreover, our conclusion is that the grounds of appeal are incoherent and do not appear to have any merit or prospects of success. It is in the interests of justice that the application for leave to appeal out of time is dismissed.

Decision

[57] The application for leave to appeal out of time is dismissed.

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

L R Harvey **JUDGE** (Presiding)	S Te A Milroy **JUDGE**	C T Coxhead **JUDGE**