

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU**

*In the Māori Land Court of New Zealand
Taitokerau District*

AP-20240000006893

WĀHANGA Section 59, Te Ture Whenua Māori Act 1993
Under

MŌ TE TAKE Mimitu Ruarei 4B 2H 4B 2J and 4B 2K
In the matter of

I WAENGA I A CHARLEY KELLY-KAIPO
Between Te kaitono
 Applicant

ME MAUREEN MATIU, RACHEL SMITH, JOHN-
And HENRY TAINUI SMITH, EDITH BRADY-
 SMITH, YVONNE JANOUT AND GARY
 RAYMOND ASHBY AS TRUSTEES OF THE
 WIREMU KAIRAU AHU WHENUA TRUST
 Ngā kaiurupare
 Respondents

Nohoanga: 10 October 2023, 265 Taitokerau MB 181-217
Hearing (Heard at Whangārei)

Whakataunga: 12 August 2024
Judgment date

TE WHAKATAUNGA A KAIWHAKAWĀ TKTAR WILLIAMS
Judgment of Judge TKTAR Williams

Hei tīmatanga*Introduction*

[1] This is an application for leave to appeal a preliminary decision of this Court under s 59 of Te Ture Whenua Māori Act 1993 (the Act) by Charley Kelly-Kaipō in relation to the Mimitu Ruarei Trust (the Trust). Ms Kelly-Kaipō is a current trustee of the Trust.

[2] By direction dated 22 July 2024, the Chief Judge directed that this Court is to determine whether leave should be granted to appeal the preliminary decision made by me on the 10th of October 2023.

[3] The application for appeal was filed on the 1st of July 2024.

Ngā take*The issues*

[4] The issues for determination are:

- (a) Was a preliminary decision made on the 10th of October 2023?
- (b) Was the application to appeal filed within the appropriate statutory timeframe?
- (c) If it was not filed within the appropriate statutory timeframe, should leave to appeal be granted pursuant to s 59?

Kōrerorero*Discussion**Purported preliminary decision*

[5] Was a preliminary decision made on the 10th of October 2023.

[6] The Act does not define what a “provisional” or “preliminary” determination is. As such, the meaning of the terms need to be ascertained from the context of statutory wording and any decisions that address the issue.

[7] The only reference to preliminary determinations is in s 59 of the Act. The Māori Land Court Rules 2011 (the Rules) do not assist in a definition of a preliminary determination and simply address the process for applying for leave to appeal pursuant to s 59.

[8] Section 59 of the Act provides as follows:

59 Appeals from Preliminary Decision

- (1) By leave of the Māori Land Court, but not otherwise, an appeal shall lie to the Māori Appellate Court from any provisional or preliminary determination of the Māori Land Court made in the course of any proceedings.
- (2) Any such appeal may be brought by or on behalf of any person who is materially affected by the determination appealed from, or who would be bound by an order made in pursuance of it.
- (3) The Māori Land Court may decline leave where it is satisfied that the interests of justice and of the parties would be best served by completing the proceedings before any appeal is made to the Māori Appellate Court.
- (4) When leave to appeal is so given, the Māori Land Court may either stay further proceedings in the manner or continue the same, but no final order shall be made until the appeal has been finally disposed of or dismissed.
- (5) When any such appeal has been determined by the Māori Appellate Court, no further appeal shall lie at the suit of any person from any final order in those proceedings by the Māori Land Court, so far as the order conforms to the determination of the Māori Appellate Court.
- (6) Where no leave to appeal is sought against any provisional or preliminary determination by the Māori Land Court in any proceedings, the Māori Appellate Court may decline to hear any appeal against the final order of the Māori Land Court made in those proceedings if it is satisfied that the appellant had a reasonable opportunity to appeal against the provisional or preliminary determination and that the point that would be in issue on the appeal is substantially the same as that to which the provisional nor preliminary determination related.

[9] In *Davis v Mihaere – Torere Reserves Trust* the Court concluded that a provisional or preliminary determination is a determination of fact or law for the purpose of making orders to dispose of the substantive proceeding, but which is provisional or preliminary to any final orders being issued.¹

[10] The Court in *Davis* also identified what constitutes an interlocutory order or direction. In terms of the lower Court, it may be regarded as an order or direction that is made for the purposes of a proceeding or intended proceeding and concerns a matter of

¹ *Davis v Mihaere – Torere Reserves Trust* [2012] 2012 Māori Appellate Court MB 641 (2012 Appeal 641), at [23].

procedure or grants some relief ancillary to that claimed in the application. Importantly an interlocutory order or direction is not a provisional or preliminary determination.

[11] In *Ward-Williams – Ngāti Tangiwai 6A Section 5 Wharepuni Marae*, referred to in *Davis*, an appellant sought to appeal a lower Court’s interlocutory directions concerning an application to appoint trustees to a Māori reservation. Chief Judge Williams (as he then was) dismissed the appeal on the basis there is no right to appeal interlocutory orders. In doing so he noted the distinction between interlocutory orders and final orders, and provisional or preliminary determinations:²

Under sections 58/93 and 59/93 the Māori Appellate Court is empowered to hear and determine appeals from final orders and provisional or preliminary determinations of the Māori Land Court. The orders appealed against here are not final orders or a provisional or preliminary determination. The orders appealed are interlocutory orders, intermediate or incidental to the judgment. They are not final. They cannot be determinations.

There is no provision in the Te Ture Whenua Māori Act 1993 or any associated legislation that empowers the Māori Appellate Court to hear appeals against interlocutory orders.

The Māori Appellate Court has no authority to hear this appeal. There are sound reasons why this must be the case. Foremost amongst these reasons is the significant delays and uncertainty that would arise if individuals were able to appeal against interlocutory orders. Such a practise might lead to interminable appeals preventing the Court from addressing the actual issues in the application before it. It would be appropriate for the appellant to await the final decision of the Court and if she is disappointed with the final or the manner in which it was reached it would then be open for her to appeal to the appellate Court.

What occurred in this process?

[12] In this matter, on 10 August 2023, Ms Kelly-Kaipō and Richardson filed an application for an injunction against the Trust, pursuant to s 19 of the Act.

[13] The injunction application sought to prevent the trustees from undertaking further trust activities upon the following grounds:

- (a) To protect the people of Wiremu Kairau from liability, illegal occupation of land, dilution of shareholdings and most importantly funding that may be fraudulently obtained and may have to be recovered.

² *Ward-Williams – Ngāti Tangiwai 6A Section 5 Wharepuni Marae* (2002) 2002 Chief Judge’s MB 264 (2002 CJ 264), at 264.

[14] I issued a direction dated 16 August 2023 outlining procedural steps to be taken which included requiring the trust to respond to the application, that response was to be filed and served on the applicant and that a judicial conference was to be scheduled for the 13th of September 2023.

[15] The above steps were taken, and a judicial conference initially scheduled for September 2023 was then rescheduled to 10 October 2023. A pānui was then issued which specifically notified the parties that a judicial conference was scheduled for 10 October 2023 at 2:00 pm. As such, all parties attending the Court hearing on 10 October were aware that the hearing set down for that date was not a substantive hearing of the application but a judicial conference.

[16] That point was reiterated by the Court at the opening of the judicial conference where I stated:³

Just before we start, just so everyone knows this is not a full hearing of the injunction application, it is a judicial conference and the point of a judicial conference is for me to assess where matters are at in terms of the application, the responses and what the pathway going forward may or may not be as a result of appearances today.

[17] No objection to that process was raised by Ms Kelly-Kaipo, Ms Richardson or any other attendee.

[18] The Court was clear that no final determination of the application would be made at the conference. The following was also stated to the attendees:⁴

... [J]ust to be clear, there isn't an injunction in place, I haven't ordered one. There is no injunction in place. This is about a process as to whether or not there is a hearing to have an injunction. There is no injunction in place at this point in time. Just because you have made an application does not mean there is one in place, in fact there is not one which is what I am trying to tell you.

This is a hearing process in order to assess whether or not there should be a final hearing to determine whether an injunction should be imposed or not.

[19] One of the fundamental issues identified by the parties at the judicial conference was that an AGM had been called off part way through the process and therefore it had not been completed. There were various reasons advanced as to why that AGM was not held,

³ 265 Taitokerau MB 181-217 (265 TTK 181-217), at 182.

⁴ 265 Taitokerau MB 181-217 (265 TTK 181-217), at 191-192.

foremost amongst them was the suggestion of bullying and intimidation of people and trustees at the hui. This was denied, but the point was that the AGM process had not run to an appropriate conclusion.

[20] Therefore, as an interlocutory step, the Court suggested a further AGM be held to its appropriate conclusion. The Court also suggested that the AGM should be held with the assistance of an independent facilitator appointed by the Court, the costs of which would be borne by the Court through the Special Aid Fund. In addition, the Court offered to provide a lawyer to assist the trust, again supported and funded by special aid. This person could provide the trust with legal advice prior to and at the AGM to assist the trust and trustees.

[21] In response to the Court's suggestion Ms Kelly-Kaipō stated:⁵

I really like your suggestion. That was kind of a suggestion we were hoping we were going to make going forward or, you know was kind of our end goal. We just want, yes, work together to honestly create better outcomes moving forward so I agree.

[22] Also, in response to the Court's suggestion, Ms Richardson, who is the other named applicant in the injunction application stated:

Yes, I think that's a great idea. I think it's a wonderful idea. I think it will move us forward, it will get us all informed. Everyone will know exactly where we are at.

[23] The Court's suggestion was also supported by the respondent trustees and therefore, interlocutory directions were made by consent to appoint a facilitator and hold an AGM for the Trust.

[24] In addition, directions were made by consent, ensuring that the appropriate documents and accounts were to be filed at the AGM and to appoint a lawyer to assist with legal advice to the trust. The Court also directed that the lawyer should attend the AGM and assist the trust and the facilitator in the running of the AGM. The final direction was that on completion of the AGM the application for an injunction may be dismissed.

[25] Therefore, there was no explicit determination of fact or law for the purpose of making orders to dispose of the substantive proceeding. Furthermore, the directions were interlocutory and made by consent.

⁵ 265 Taitokerau MB 181-217 (265 TTK 181-217), at 204.

[26] As the directions were interlocutory in nature and not susceptible to appeal it is the conclusion of this Court, that this effectively disposes of the appeal.

Was the application made to appeal filed within the appropriate statutory timeframe?

[27] Nevertheless, I propose to address the issue of leave to appeal out of time (lest I am wrong in my determination of the first issue) assuming that there was a proper appeal in respect of which leave to appeal out of time could be sought.

[28] There is no specific timeframe set out in s 59 for the filing of an appeal. However, rule 8.13 of the rules sets out the following where leave is sought to appeal from a provisional or preliminary determination.

Rule 8.13

- (1) An application for leave to appeal under s 59 of the Act from a provisional or preliminary determination may be made-
 - (a) Orally in open court during the sitting at which the provisional or preliminary determination was made; or
 - (b) In writing lodged with the clerk of the Court during that sitting; or
 - (c) In writing lodged with the Registrar
- (2) The application must-
 - (a) be in form 14; and
 - (b) be lodged within 1 month after the date on which the determination was made or within any later time allowed by a Judge; and
 - (c) specify the grounds for making the application.

[29] The application for leave to appeal was not made orally or in writing to the court at the time it was sitting. It was made in writing and filed with the Registrar, but it was not filed using form 14.

[30] The date of the minute of the order appealed from is 10 October 2023. An appeal filed in accordance with rule 8.13(2)(b) should have been filed by 10 November 2023. The appeal is recorded as being filed on 1 July 2024.

[31] Therefore, the appeal was filed well outside the statutory timeframe and not in the appropriate format.

If it was not filed within the appropriate statutory timeframe, should leave to appeal be granted pursuant to s 59?

[32] As the appeal was filed almost a full eight months out of time, the issue I must consider is whether I should grant leave or an extension to appeal.

[33] The overarching consideration in determining whether to grant leave or an extension to appeal is where the interests of justice lie. Relevant considerations are:⁶

- (a) The length of the delay;
- (b) Reasons for it;
- (c) The conduct of the parties;
- (d) The extent of any prejudice caused by the delay;
- (e) The intrinsic merits of the appeal; and
- (f) Whether the appeal raises any issue of public importance.

Length of delay

[34] The length of delay from 10 November 2023 to 1 July 2024, being almost eight months out of time is significant and inordinate.

Reasons for it

[35] Appellants who are granted leave to appeal under s 59 have an even greater duty to pursue an appeal in a timely manner and, therefore, must have very good reasons for any delay.

⁶ *Pearce v Pearce* [2012] NZCA 378. .

[36] There is no explanation provided by the appellant for delay in filing the appeal. There is no explanation why the appellant did not file the appeal by 10 November 2023.

The conduct of the parties

[37] The conduct of Ms Kelly-Kaipo is concerning.

[38] The date of the filing of the appeal (1 July 2024) was the day prior to the substantive hearing being held to deal with Ms Kelly-Kaipo's injunction application. No notice was provided to the Court or the parties prior to the hearing, of her proposed appeal or the filing of it.

[39] Ms Kelly-Kaipo, who attended the substantive hearing the next day, also failed to advise the Court or attendees about the filing of this appeal. The appellant knew that a hearing was being held to consider her injunction application and despite this, she did not see fit to advise the Court that she had filed this appeal.

[40] Leave of the Court is required for an appeal pursuant to s 59. Appeals of this nature interfere with the incomplete process of the Court. Ms Kelly Kaipo was patently aware that the hearing into the injunction application had not been completed but was about to be dealt with.

Prejudice

[41] As indicated earlier, this Court has the jurisdiction pursuant to s 59(3) to decline leave to appeal if I am satisfied that the interests of justice and of the parties would be best served by completing the proceedings before any appeal is made.

[42] The Court's process was concluded the day after the application to appeal was filed.

[43] A decision was made orally on the day of the hearing of 2 July dealing with the injunction application.

[44] I can only conclude that the appellant sought to subvert the Court process by filing a belated appeal in the hopes that final orders would be stayed. This is highly prejudicial for the Trust, trustees, and beneficiaries.

[45] Given the above, I am inclined to consider the conduct of the appellant is disentitling.

The merits of the appeal

[46] I note that the appeal also refers the orders made on 10 October as “his Honours directions” as opposed to orders.⁷

[47] The appellant seeks to challenge the exercise of my discretion when I convened a judicial conference so that interlocutory steps could be taken.⁸

[48] The purpose of the 10 October 2023 judicial conference was to identify the process to address the injunction application in the most convenient and expeditious manner. It was also convened to identify all the matters in dispute that required determination.

[49] The appeal also complains that other applications relevant to the operation of the Trust were being scheduled to be heard alongside the injunction application at a later date.⁹

[50] These issues are raised in paragraphs 6-7 of the notice of appeal and focus on a facilitated meeting held on the 27th of April 2024, in accordance with the interlocutory directions.

[51] It appears that the appellant now seeks to appeal due to her unhappiness with the outcome of the facilitated AGM held on the 27th of April 2024 and a decision by this Court to hear new applications filed alongside the injunction hearing.

[52] The process for and outcome of the 27 April AGM was not a matter dealt with in the 10 October directions. I also have the discretion pursuant to s 67(1) to hear any relevant and new applications at any appropriate times. The interlocutory directions of 10 October 2023 do not address or discuss applications filed subsequently.

[53] The notice of the appeal does not identify any meritorious grounds of appeal.

⁷ (1 July 2024) Charley Kelly-Kaipo Statement of Grounds of Appeal, at [6].

⁸ Application to Appeal, above, at [2].

⁹ Application to Appeal, above, at [4].

Issue of public importance

[54] The proposed appeal does not raise any issue of general and public importance.

Interests of justice

[55] It is not in the interest of justice to grant leave to appeal out of time.

Whakataunga

Decision

[56] The delay in filing the appeal only adds further uncertainty for the Trust and its beneficiaries. Had an appeal been filed on time it could have been heard and disposed of in February 2024. If it were to proceed now it would result in ongoing uncertainty which is unjustifiable and prejudicial.

[57] Even if I were minded to grant leave, the appeal seeks a hearing of the injunction application. That has occurred and a decision was made on 2 July 2024.

[58] I conclude therefore that the appeal is without jurisdiction as it relates to interlocutory directions.

[59] In addition, the appellant has not satisfied me that leave to appeal should be granted.

[60] Therefore, pursuant to ss 56(1)(g) and 58(3) the appeal and the application for leave are dismissed.

I whakapuaki i te 9:00 am i Whangārei, 12th o ngā rā o Akuhata i te tau 2024.

Pronounced at 9:00 am in Whangārei on Monday this 12th day of August 2024.

TKTAR Williams
JUDGE