

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND  
TAKITIMU DISTRICT**

**A20140008837**

UNDER Section 58, Te Ture Whenua Maori Act 1993  
IN THE MATTER OF Mohaka A4 Trust  
BETWEEN ARTHUR THORPE GEMMELL  
Applicant  
AND SAMUEL CARTER (COTTER) GEMMELL  
Respondent

Hearing: 12 November 2014  
(Heard at Hastings)

Coram Deputy Chief Judge C L Fox (Presiding)  
Judge S Te A Milroy  
Judge D J Ambler

Appearances: M J Wenley for the appellant  
B Fletcher and Q Davies for the respondent

Judgment: 17 November 2015

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**RESERVED JUDGMENT OF THE MĀORI APPELLATE COURT AS TO COSTS**

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## Introduction

[1] In our decision of 8 May 2015 we allowed Arthur Gemmell’s appeal against Judge Harvey’s costs award of 7 July 2014 and substituted our own costs award, splitting the costs between the “pre-2005 trustees” (as to 25 percent) and the “2005 trustees” (as to 75 percent).<sup>1</sup> Thus, Arthur’s costs liability reduced from being solely liable for \$12,000.00 costs, to being jointly and severally liable with his fellow pre-2005 trustees for the sum of \$2,297.12. As far as costs on the appeal were concerned, we left counsel to resolve that issue themselves, failing which they were to file submissions. Counsel were not able to resolve costs themselves. This decision therefore addresses their submissions in relation to costs on the appeal.

## Submissions of the parties

[2] Mr Wenley, for Arthur, filed an application for costs dated 8 June 2015. Arthur seeks costs against his brother, Samuel Gemmell, on the basis that Arthur was largely successful on appeal. His actual costs on appeal are said to be \$10,104.30, though Mr Wenley did not submit copies of the invoices. By comparison, Mr Wenley submits that High Court scale 2B costs would amount to \$9,802.50. Mr Wenley notes that Arthur has in fact already paid the costs award in terms of our judgment of 8 May 2015 in the sum of \$2,297.12, as Sam’s solicitors had been holding the sum of \$12,000.00 paid by Arthur in satisfaction of the lower Court’s original costs award. Mr Wenley submits that Arthur is entitled to his full actual costs of \$10,104.30. In addition, Mr Wenley asks for Arthur’s \$1,000.00 of security for costs to be refunded to him.

[3] Mr Davies, for Sam, submits that costs on the appeal should lie where they fall. He refers to the leading decision of *Samuels v Matauri X Incorporation*.<sup>2</sup> He says the present case is out of the ordinary in that Sam was successful in the lower Court in relation to the substantive proceeding; he brought to the Court’s attention dysfunction and failure to account by the Mohaka A4 Trust; he was largely successful in the case overall as he retained the majority of his costs judgment (by sum) and Arthur remained liable to pay for \$2,297.12 of costs; and the amount of money at stake was small.

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<sup>1</sup> *Gemmell v Gemmell - Mohaka A4 Trust* [2015] Maori Appellate Court MB 114 (2015 APPEAL 114)

<sup>2</sup> *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate Court MB 216 (7 APWH 216) at [8]-[14].

[4] Mr Davies refers to *Muru v Te Aho – Maungatautari 4G Section IV Block* and *Nicholls v Nicholls - Part Papaaroha 6B Block* as precedents wherein this Court did not award costs on a costs appeal.<sup>3</sup> He characterised Arthur’s application as seeking costs on costs, which are rarely awarded.

[5] If the Court were minded to award costs, Mr Davies submits the Court could make the costs award against the Mohaka A4 Trust itself rather than against Sam, as Sam had brought the substantive proceedings in the lower Court on behalf of all beneficiaries of the Trust. He also submits that as Sam was in receipt of Special Aid at some point in time, costs should not be awarded against him. As for the quantum, if there were to be costs awarded to Arthur then a modest award only would be appropriate: the quantum sought in relation to the appeal should not exceed the costs awarded in the substantive proceedings overall, Sam was largely successful in maintaining the costs award in the lower Court and the benefit of that award should not be taken away by a costs award on the appeal.

### Discussion

[6] Arthur was largely successful in the appeal in that the original costs award of \$12,000.00 against him solely was overturned and substituted by a costs award of \$2,297.12 against the pre-2005 trustees (which included Arthur) and \$6,891.38 against the 2005 trustees (which did not include Arthur). We therefore agree with Mr Wenley that as costs should follow the event, Arthur is entitled to an award of costs on the appeal.

[7] We reject in particular Mr Davies’ arguments that an award of costs against Sam is not appropriate because he was at some point in time in receipt of Special Aid. While the Special Aid Fund has some similarities to the legal aid regime under the Legal Services Act 2011, it is not the same thing, and certainly does not include statutory provisions whereby costs can only be awarded in “exceptional circumstances”. Receipt of Special Aid is not a shield against an award of costs, as Judge Harvey noted in the lower Court decision in *Trustees of the Horina Nepia Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal*

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<sup>3</sup> *Muru v Te Aho – Maungatautari 4G Section IV Block* [2013] Māori Appellate Court MB 5 (2013 APPEAL 5) and *Nicholls v Nicholls - Part Papaaroha 6B Block* [2011] Māori Appellate Court MB 64 (2011 APPEAL 64).

*Committee and Tahamata Incorporation*.<sup>4</sup> While in this decision we are not called upon to decide whether costs can only be awarded against someone in receipt of Special Aid in “exceptional circumstances”, and have not received detailed submissions in this regard, we have doubts about the correctness of such an approach.<sup>5</sup>

[8] We also reject Mr Davies’ submission that costs should be awarded against the Mohaka A4 Trust. It was Sam who singled-out Arthur for the costs award in the lower Court, and Sam must therefore bear the responsibility for the outcome of the lower Court’s costs award against Arthur and the subsequent appeal.

[9] Turning to the issue of quantum, we do not accept that Arthur is entitled to what would in effect be indemnity costs. It cannot be said that Sam acted unreasonably in opposing the appeal. Further, the appeal issues were not overly complex, though this Court had to navigate carefully the multiple applications run in the lower Court and other courts in recent years concerning the trust. We certainly do not believe High Court 2B scale costs are appropriate.

[10] We also note that while Arthur was largely successful in the appeal, he has nevertheless been held jointly and severally liable for 25 percent of the costs in the lower Court proceeding.

[11] The most telling factor in assessing quantum is that the ultimate award of costs in favour of Sam per our decision of 8 May 2015 represented a contribution of approximately one third of the actual legal costs Sam had incurred, together with the actual costs of his expert witness.<sup>6</sup> Overall, we consider that an equivalent approach should be taken here. That is, that in relation to the appeal, Sam should meet Arthur’s Court filing fee (\$350.00) and one third of Arthur’s actual legal costs (approximately \$3,252.00).

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<sup>4</sup> *Trustees of the Horina Nepia Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238).

<sup>5</sup> This approach was suggested in *Wairoa District Council v Wairau – Kaiwaitau* 7C2B (2009) 128 Wairoa MB 168 (128 WR 168).

<sup>6</sup> See *Gemmell v Gemmell - Mohaka A4 Trust* [2015] Maori Appellate Court MB 114 (2015 APPEAL 114) at [70].

**Outcome**

[12] We therefore make orders as follows:

- (a) Pursuant to s 79 of Te Ture Whenua Māori Act 1993 ordering Samuel Carter (Cotter) Gemmell to pay the total sum of costs on the appeal of \$3,602.00 to Arthur Thorpe Gemmell;
- (b) Ordering the Registrar to refund the security for costs of \$1,000.00 to Arthur Thorpe Gemmell.

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



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C L Fox  
**DEPUTY CHIEF JUDGE FOX**  
(Presiding)

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S Te A Milroy  
**JUDGE**

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D J Ambler  
**JUDGE**